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In The

Supreme Court of the United States

October Term, 1991

JAMES M. MULLIKIN, JR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the general five year statute of limitations against penalty enforcements by the Government, which applies "[e]xcept as otherwise provided by Act of Congress," can be overridden by an anti-fraud tax penalty statute that is silent as to a statute of limitations.

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, James M. Mullikin, Jr., requests that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this action on December 30, 1991, which reversed the final judgment of the United States District Court for the Eastern District of Kentucky.

OPINIONS BELOW

The published opinion of the United States Court of Appeals for the Sixth Circuit was filed on December 30, 1991, and is cited at 952 F.2d 920. This opinion appears as Appendix A.

The order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's petition for rehearing was filed on March 13, 1992. This order appears as Appendix B.

The unpublished Memorandum Opinion and Order of the United States District Court for the Eastern District of Kentucky at Lexington was filed on July 13, 1990. This opinion appears as Appendix C.

The judgment of the United States District Court for the Eastern District of Kentucky at Lexington sustaining Petitioner's motion for partial summary judgment and overruling Respondent's motion for summary judgment and establishing the amount due from the Petitioner to the Respondent pursuant to the previously mentioned Memorandum Opinion and Order was filed on September 12, 1990. This judgment appears as Exhibit D.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was entered on December 30, 1991. The order of the United States Court of Appeals for the Sixth Circuit denying the Petitioner's timely petition for rehearing was filed on March 13, 1992. This petition was filed within ninety (90) days of the date of the order denying Petitioner's petition for rehearing. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant portions of the following statutory and regulatory provisions are reproduced in the appendix to the petition at App. 53-67: 26 U.S.C. § 6700; 26 U.S.C. § 6701; 26 U.S.C. § 6702; 26 U.S.C. § 6703; 28 U.S.C. § 2462; 28 U.S.C. § 791; 26 U.S.C. § 6501; 26 U.S.C. § 6502(a); 26 U.S.C. § 6694; and 26 U.S.C. § 6696(d).

STATEMENT OF THE CASE

Introduction.

This case involves a challenge to the enforcement by the Internal Revenue Service ("IRS") of a civil tax penalty against an accountant for aiding and abetting one of his clients in the understatement of a tax liability. The IRS took no action to enforce the penalty within five years of the violation, and the accountant asserts that enforcement of the penalty is barred by the five year statute of limitations contained in 28 U.S.C. § 2462. The district court held that the five year statute of limitations applied to bar enforcement of the penalty. The United States Court of Appeals for the Sixth Circuit reversed. One judge dissented.

Facts.

James M. Mullikin ("Mullikin"), an accountant, prepared eight quarterly employment tax returns, Forms 941, for Vanco International, Inc. ("Vanco") for the years 1982 and 1983. Mullikin also prepared nine Wage and Tax Statements, W-2 Forms, for Vanco employees in 1982, and ten W-2 Forms for Vanco employees in 1983. In preparing

the tax documents, Mullikin failed to include the portion of wages paid to Vanco employees in cash. As a result of Mullikin's failure to include cash wages, Vanco's liability for payroll and withholding taxes, and the employees' respective income tax liabilities were understated. The IRS subsequently made the determination that Mullikin's actions with respect to the various tax forms constituted the aiding and abetting of the understatement of tax liability in violation of 26 U.S.C. § 6701,[1] and assessed penalties against Mullikin in the total amount of $99,000.

Pursuant to the assessment challenge procedure set forth in section 6703(c)(1), Mullikin paid fifteen percent of the assessed penalties within thirty days of the notices of assessment and filed claims for refund of the amounts paid. The IRS denied one claim for a refund and failed to address the second claim within the time specified by the Internal Revenue Code ("IRC"). Accordingly, Mullikin filed suit in the United States District Court for the Eastern District of Kentucky against the United States seeking a refund of the portions of the penalty assessments paid. The parties filed cross-motions for summary judgment and the district court sustained Mullikin's motion for partial summary judgment finding that the five year statute of limitations contained in 28 U.S.C. § 2462 applied to the assessment of penalties pursuant to section 6701 and that 28 U.S.C. § 2462 barred the assessment of any penalties relating to tax forms filed more than five years before

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1986.

the dates of the respective notices of assessment.[2] Accordingly, the district court found that even though Mullikin prepared a total of eight quarterly Forms 941 for Vanco for 1982 and 1983, the IRS could only properly assess one $10,000 penalty against Mullikin for the last corporate Form 941 prepared for 1983. In addition, the court held the IRS could properly assess ten $1,000 penalties for the ten W-2 Forms Mullikin prepared for Vanco employees for 1983 since the IRS assessed these penalties within five years of the filing of the forms. Thus, the court partially granted each party's motion for a partial summary judgment holding that $20,000 of the penalties were owing, but the balance was barred by the five year statute of limitations. The Government appealed the district court's decision to the United States Court of Appeals for the Sixth Circuit. That court reversed the lower court, holding that no statute of limitations applied to the assessment of the section 6701 penalties. Judge Boggs dissented from the majority decision.

Tax Shelter Penalties.

In 1982, as a portion of a package of legislation designed to discourage abusive tax shelters, Congress added section 6701[3] to the IRC, which provides penalties

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[2] The district court further found that the phrase "taxable period," as used in section 6701(b)(3), is the equivalent of calendar year. That holding was also reversed by the circuit court, but review of that holding is not requested.

[3] Section 6701(a) imposes the penalty:

(a) IMPOSITION OF PENALTY. – Any person –

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,

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against persons who aid and abet taxpayers in the understatement of their tax liability. Along with the enactment of section 6701, Congress enacted a penalty against persons promoting abusive tax shelters (section 6700), a penalty on taxpayers filing frivolous returns (section 6702), and a penalty on any person who fails to report required tax shelter information (section 6704). In addition to enacting the penalties, Congress also enacted section 6703 which provides a special set of rules for enforcing the tax shelter penalties. Most relevantly, section 6703(c) provides certain special rules that allow a person against whom a section 6700, 6701, or 6702 penalty is asserted to pay fifteen percent of the penalty demanded, file a claim for refund, receive administrative consideration of his claim, file a suit in district court and enjoin further collection during the pendency of the litigation. *Conspicuously absent from section 6703 and related statutes, however, was a provision that addresses a statute of limitations for sections 6700, 6701, and 6702 penalties.*

IRC – Statute of Limitations on Penalties.

The IRC contains many penalties that are enforced against taxpayers and others, such as tax return preparers. Penalties are provided for fraud, negligence, late

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(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

filing, late payment, fraudulent statements, failure to make tax deposits, failure to file actuarial reports, etc. These penalties generally appear in Chapter 68 of the IRC which is subdivided into Subchapters A and B. The IRC has designated the penalties in Subchapter B as "Assessable Penalties", i.e. penalties that are assessed and collected in the same manner as taxes "except as otherwise provided" (section 6671). Section 6701 penalties are included in Subchapter B as assessable penalties.

Because the penalties set forth in Subchapter B, "except as otherwise provided" are subject to the same rules of enforcement as taxes, they become subject to a multitude of rules as to assessments, notices, appeals, hearings, litigation rights, collections, etc. These various rights are designed to provide a taxpayer or a person against whom a penalty is asserted with a fair and equitable determination as to his or her liability for the tax or penalty.

Each of these rights is subject to various statutes of limitation. The assessment of assessable penalties (the first step in the enforcement process of section 6701 penalties) is generally subject to the statute of limitations contained in section 6501(a), which prohibits assessments more than three years after the filing of a tax return.[4]

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[4] The act of assessing a penalty is accomplished by an employee of the IRS recording the penalty on an official internal IRS document. In order for the assessment to be timely, it must occur prior to the expiration of any applicable statute of limitations. Once a penalty is properly assessed, it must be collected by the IRS. Taxpayers can voluntarily pay the penalties or the IRS can act to involuntarily collect these amounts through levy or suit. The IRC provides a second statute of

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Longer statutes of limitation are sometimes provided by the IRC. In two situations, the assessment of the fraud penalty and the penalty on willful or reckless conduct of a tax preparer (sections 6501(c)(1) and 6696(d)(1), respectively) Congress has specifically provided unlimited statutes of limitation.

Three Year Statute of Limitations.

In recent years, numerous persons have argued that the three year statute of limitations set forth in section 6501(a) applies to the enforcement of tax shelter penalties. All courts addressing this issue have rejected this argument. *See, Sage v. United States,* 908 F.2d 18 (5th Cir. 1990); *Emanuel v. United States,* 705 F.Supp. 434 (N.D. Ill. 1989); *Agbanc, Ltd. v. United States,* 707 F.Supp. 423 (D. Ariz. 1988); *Kuchan v. United States,* 679 F.Supp. 764 (N.D. Ill. 1988).

The district court in *Kuchan, supra,* the first decided case, established the rationale for subsequent courts denying application of the three year statue of limitations to the enforcement of tax shelter penalties. The court relied on four separate reasons for rejecting the petitioner's arguments. The first reason was that section 6501(a) operates off the filing of a tax return while section 6701 requires no filing of a tax return. Second, section

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limitations to this part of the penalty enforcement process. Thus, pursuant to section 6502 even a timely assessed penalty must be collected through levy, etc. by the IRS within six years of its assessment. (Recently, Congress extended this statute of limitations to ten years.)

6703, which prescribes special procedural rules for sections 6700, 6701, and 6702 penalties, makes no mention of a statute of limitations. Third, statutes of limitation barring the collection of taxes are strictly construed in favor of the Government. Finally, the court noted from the legislative history of section 6701 that it was analogous to the penalty for fraud, and because the fraud penalty had an unlimited statute of limitations, the court concluded Congress also intended for section 6701 penalties to have an unlimited statute of limitations.

Application of 28 U.S.C. § 2462.

Mullikin has not argued the application of the three year statute of limitations, but instead has asserted that in the absence of a statute of limitations under the IRC, the general catch-all statute of limitations contained in 28 U.S.C. § 2462 applies to the enforcement of the section 6701 penalties. 28 U.S.C. § 2462,[5] in pertinent part, provides that "[e]xcept as otherwise provided by Act of Congress", no proceeding to enforce a civil penalty can be entertained unless commenced within five years from the date the claim for the penalty first accrued.[6]

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[5] That section provides in full as follows: "Time for commencing proceeding. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon." 28 U.S.C. § 2462.

[6] 28 U.S.C. § 2462 was enacted in 1948, 62 Stat. 974. It was the successor to and was based on 28 U.S.C. § 791. Together

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District Court Opinion.

In its Memorandum Opinion and Order, *Mullikin v. United States*, App., *infra* at 37, the district court held that the five year statute of limitations contained in 28 U.S.C. § 2462 was applicable to the enforcement of section 6701 penalties. As a result, Mullikin was deemed to owe $20,000 of the asserted $99,000 of penalties and enforcement of the balance of the penalties ($79,000) was precluded by 28 U.S.C. § 2462.

The court found no controlling authority that had addressed the question of whether 28 U.S.C. § 2462 applies to section 6701 penalties. In this regard, the court did not find this Court's decision in *Badaracco v. Commissioner*, 464 U.S. 386 (1984) applicable. Rather, the court noted that *Badaracco* involved the three year statute of limitations contained in section 6501(a) and the statutory exception to the three year statute contained in section 6501(c)(1) for false and fraudulent returns. The district court stated that "[w]ithout further guidance from the United States Supreme Court, this Court is not bound in the instant case by the high court's decision in a *tax collection* case" and "unlike the assessment in *Badaracco*, the payment at issue . . . contains penalty assessments." App., *infra* at 42.

Furthermore, the court did not find the decisions of "sister" courts as to the applicability of the three year statute of limitations controlling. Although it speculated that the "sister" courts, which had decided the cases

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these two statutes have supplied a statute of limitations on penalty enforcements by the Government for all of the 20th century.

involving the three year statute, might find 28 U.S.C. § 2462 inapplicable, the court was of the opinion that there was no authority that *clearly indicated* that no statute of limitations applied to section 6701 penalties. *Id.* at 44. In that regard, the court noted that the statute of limitations contained in 28 U.S.C. § 2462 could not be ignored and that *where Congress has failed to otherwise provide a limitation period or to specifically provide that an action may be brought at any time, Congress has expressed its intent in 28 U.S.C. § 2462 by supplying a statute of limitations.* Accordingly, the court held that the five year statute of limitations applied.

Court of Appeals' Opinion.

Majority Opinion.

In reversing the lower court, the circuit court in *Mullikin v. United States*, 952 F.2d 920 (5th Cir. 1991) also noted that there were no reported cases as to the application of 28 U.S.C. § 2462 to tax shelter penalties, but many cases had held that the three year statute did not apply to the assessment of these penalties because they were anti-fraud penalties. The court stated that while the three year cases did not address the applicability of 28 U.S.C. § 2462 to tax shelter penalties, they seemed to stand for the proposition that Congress intended for the tax shelter penalties to be assessed at any time.

The court then found that Congress did not intend for 28 U.S.C. § 2462 to apply to the assessment of section 6701 penalties. In so concluding, the court noted that although the legislative history of section 6701 *"did not offer any direct evidence"* regarding the intent of Congress as to any applicable statute of limitations, it did show

that Congress intended tax shelter penalties to be 'anti-fraud penalties, and it was therefore appropriate to interpret section 6701 in light of other anti-fraud penalties. *Id.* at 928. (Emphasis added.) The court said that in other anti-fraud provisions in the IRC Congress had specifically provided unlimited statutes of limitation.[7]

Further, the court observed that the Government is not subject to a statute of limitations unless it expressly so provided and a statute of limitations sought to bar the Government must be strictly construed. Moreover, the court noted that 28 U.S.C. § 2462 only applies in *"instances in which Congress has not otherwise provided a statute of limitations" and "in the case of Section 6701 penalties, the court finds that Congress has otherwise provided for a statute of limitations within the Internal Revenue Code and therefore, section 2462 has no application." Id.* at 929. (Emphasis added.)

The court said that evidence of such Congressional intent could be seen from the fact that section 6703(c) (the statute containing special procedural rules for enforcing tax shelter penalties) makes no reference to a statute of limitations on assessments but does make a reference to the statute of limitations on collections. The Court reasoned that the *failure to mention* the statute of limitations on assessment *signified congressional intent* that no statute of limitations on assessment was intended to apply.

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[7] The court cited section 6501(c)(1), which provides an unlimited statute of limitations for the fraud penalty and section 6696(d)(1), which provides an unlimited statute of limitations on the penalty assessed for willful or reckless conduct of a tax return preparer in understating a tax liability.

Dissent.

Judge Boggs disagreed with the analysis of the majority opinion and stated that the reasoning for applying the five year statement of limitations was "quite straightforward". *Id.* at 933. (Boggs, J., dissenting). He stated that 28 U.S.C. § 2462 applied to the enforcement of tax penalties "for all cases where the Internal Revenue Code does not otherwise provide such a statute (which includes, presumably, an explicitly unlimited period for prosecution)" and that both parties agreed that the IRC contained no explicit statute of limitations applicable to section 6701. *Id.*

He further observed that the majority opinion argued *why* a statute of limitations *should not* apply to section 6701, but by enacting 28 U.S.C. § 2462 Congress did provide a statute of limitations that *"had effect over every section within its compass, whether or not that section could be construed as an antifraud provision." Id.* (Emphasis added.)

Next, Judge Boggs indicated that it was particularly notable that the two comparable anti-fraud sections of the IRC on which the court relied contain explicit unlimited statutes of limitation. He felt that the Congressional failure to provide an explicit unlimited statute of limitations for section 6701 was additional evidence that 28 U.S.C. § 2462 was intended to apply. Finally, the dissent concluded with the observation that it was "ironic" that the court on one page of its opinion referred to the concession by the IRS that " 'Congress [ ], fail[ed] to include . . . a statute of limitations in § 6701,' yet on the very next page, it found 'that Congress has otherwise provided for a statute of limitations in § 6701.' " Id. (Quoting majority opinion.)

REASONS FOR GRANTING THE WRIT

Introduction

This case presents issues of considerable national importance. The term "[e]xcept as otherwise provided by Act of Congress" is contained in eight different general statutes that apply to important areas of the law, including the original jurisdiction of the federal district courts. To allow a general statute containing such language to be overridden by a subsequent statute, without a clear and affirmative showing of Congressional intent to override, would allow the courts to pick and choose among Congressional enactments.

Furthermore, the more narrow question of whether a statute of limitations applies to tax shelter penalties is very important. There are literally thousands of these penalties being asserted annually against tax professionals and others. To allow these penalties to be enforced against individuals without the benefit of any statute of limitations involves serious issues of equity and fairness. This is particularly true in light of the fact that Congress did not affirmatively provide a specific unlimited statute of limitations for these penalties.

I. EXCEPTIONS TO A GENERAL STATUTE CONTAINING THE TERM, "EXCEPT AS OTHERWISE PROVIDED BY ACT OF CONGRESS", SHOULD NOT BE MADE WITHOUT A *"CLEAR"* AND *"AFFIRMATIVE"* SHOWING THAT CONGRESS INTENDS TO OVERRIDE THE GENERAL STATUTE.

Introduction. Congress has enacted eight general statutes that apply "[e]xcept as otherwise provided by Act of Congress." This Court has previously held that

a statute containing such language should only be overridden by a *"clear"* and *"affirmative"* expression of Congressional intent to override the statute. *Colorado River Water Cons. Dist. v. United States,* 424 U.S. 800 (1976). However, in *Mullikin, supra,* a case involving the application of a statute of limitations against the Government, the circuit court failed to apply the *"clear"* and *"affirmative"* standard and relied on the *"silence"* in section 6701 as to a statute of limitations to be adequate to override 28 U.S.C. § 2462. Furthermore, the circuit court's decision is based on its rationale of *why* a statute of limitations *should* apply. In the face of a clear and plainly applicable statute, a decision based on such rationale is inconsistent with this Court's rationale in *Badaracco v. Commissioner, supra.* Finally, the circuit court misconstrued the "silence" of section 6701 as to statutes of limitation.

"Clear" and "Affirmative" Standard. In addition to 28 U.S.C. § 2462, the United States Code contains seven other statutes that include the term "[e]xcept as otherwise provided by Act of Congress."[8] These statutes, like 28

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[8] 28 U.S.C. § 1336 (jurisdiction of federal district courts of any civil action to enforce orders of the Interstate Commerce Commission); 28 U.S.C. § 1345 (jurisdiction of federal district courts over civil actions commenced by the United States); 28 U.S.C. § 1502 (limitations on jurisdiction of U.S. Claims Court in treaty cases); 28 U.S.C. § 1693 (limitation on arrest of a person in one district for trial in another district in any civil action in a district court); 28 U.S.C. § 1925 (Supreme Court's right to prescribe allowances and taxation of cost in admiralty and maritime cases); 33 U.S.C. § 701a-1 (right of Secretary of Agriculture to prosecute federal investigation of watersheds); 33 U.S.C. § 701b (right of Secretary of Army to conduct federal investigations and improvements of rivers for flood control and allied purposes.)

U.S.C. § 2462, are general statutes which provide the governing authority in designated areas, except where Congress has enacted overriding authority. These statutes are important to the administration of justice and should not be overridden by courts arbitrarily.

The term "[e]xcept as otherwise provided by Act of Congress" is a straightforward term written in clear and plain language. In *Colorado River, supra*, this Court considered the phrase for the first time when it was asked whether 28 U.S.C. § 1345, which grants original jurisdiction to federal district courts in suits brought by the federal Government, had been overridden by the McCarran Amendment, 43 U.S.C. § 6661, for cases involving ownership by the United States of water rights. 28 U.S.C. § 1345 gives jurisdiction to the federal district courts in suits brought by the Government "[e]xcept as otherwise provided by Act of Congress." However, in *Colorado River, supra*, the plaintiff contended that the McCarran Amendment had overridden 28 U.S.C. § 1345 because in the Amendment the Government had consented to be joined as a defendant in certain suits involving the adjudication of water rights. In analyzing whether the enactment of the McCarran Amendment overrode 28 U.S.C. § 1345, the Court scrutinized the actual language of the statute and its legislative history for a *"clear"* Congressional purpose to override federal jurisdiction. *Id.* at 807. The Court said that in statutes involving jurisdiction of courts, the force and effect of such statutes should not be *"disturbed by a mere implication flowing from subsequent legislation." Id.* at 808. The Court further noted that unless two statutes are irreconcilable, some *"affirmative"* showing of a Congressional intention to repeal must be made

before a subsequent statute can be treated as overriding an earlier statute. *Id.*

Although the *"clear"* and *"affirmative"* standard was used by this Court for the first time in *Colorado River, supra,* in relation to a statute containing the term "[e]xcept as otherwise provided by Act of Congress", the standard has been long recognized by courts. For example, in *Morton v. Mancari,* 417 U.S. 535 (1974), a case relied on by the Court in *Colorado River, supra,* this Court used the standard in holding that the preference for employment of Native Americans by the Bureau of Indian Affairs, contained in the Indian Reorganization Act of 1934 (25 U.S.C. § 461), had not been overridden by the Equal Employment Opportunity Act ("EEOA") of 1972 (42 U.S.C. §§ 2000 *et seq.*). As in *Colorado River, supra,* the Court noted that the cardinal rule was *"that repeals by implication are not favored"* and rejected the finding of the lower courts that *"Congressional silence"* effectuated a repeal. *Morton,* 417 U.S. at 549-550. Instead, the Court required an *"affirmative"* showing that Congress intended the EEOA to repeal the Indian employment preference contained in the Indian Reorganization Act. *Id.* at 550. It found none. The Court noted *"that courts are not at liberty to pick and choose among congressional enactments"* and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective: "[t]he intention of the legislature to repeal 'must be *clear and manifest.*' " *Id.* at 550-551. (Emphasis added.)

Another case of particular relevance is *United States v. Greathouse,* 166 U.S. 601 (1897), where this Court used these legal principles in a case involving the application of a statute of limitations in regard to actions against the

Government. In that case, the Court refused to hold that a portion of the six year statute of limitations applicable to claims against the Government had been repealed by a later statute. Although the Court observed that there were *"some grounds"* for holding that Congress intended for the later statute to repeal the earlier statute, the Court held that the earlier statute had not been *"expressly abrogated"*; and, therefore, could only be deemed repealed through implication, and repeals by implication are not favored. *Id.* at 605. (Emphasis added.)

The United States Court of Appeals for the Fifth Circuit has applied these principles to the application of 28 U.S.C. § 2462. In *United States v. Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), the court in discussing the application of 28 U.S.C. § 2462 stated as follows:

> The interpretation of § 2462 advanced by the government is in derogation of the right to be free of stale claims, which comes in time to prevail over the right to prosecute them. *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428, 85 S.Ct. 1050, 1054, 13 L.Ed.2d 941 (1965), quoting *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). *There are exceptions to this rule, notably actions to collect fraudulently withheld taxes, but where the Congress has meant to make such exceptions, it has clearly expressed that intent. See, Badaracco v. Commissioner*, 464 U.S. 386, 104 S.Ct. 756, 78 L.Ed.2d 549 (1984). *Id.* at 483. (Emphasis added.)

Silence. In spite of this authority, in *Mullikin, supra*, the circuit court did not even attempt to point to any *"affirmative"* showing of Congressional intent to override 28 U.S.C. § 2462 and instead relied on the *"silence"* of section 6701 and the related statutes as an expression of

the *"clear"* Congressional intent to override 28 U.S.C. § 2462. The circuit court summarized its analysis in this regard by stating:

> The Court finds Congress did not intend that the statute of limitations in Section 2462 apply to Section 6701. As emphasized above, the statute itself is *silent* as to a period of limitation. The legislative history behind the enactment *does not offer any direct evidence* as to an applicable statute of limitations. 952 F.2d at 928. (Emphasis added.)

The circuit court's reliance on *"silence"* rather than an *"affirmative"* expression of Congressional intent is a departure from established principles of law which stands 28 U.S.C. § 2462 on its head and could have similar effects on other statutes containing the term "[e]xcept as otherwise provided by Act of Congress."

Badaracco. Moreover, the circuit court's opinion argues what the law *should be* and not what it *is*. In fact, the dissent in *Mullikin, supra,* so charges. Such an exercise is unnecessary and is in direct contravention to the holding in *Badaracco v. Commissioner, supra,* a case on which the circuit court relied heavily and the leading case as to the application of statutes of limitation to the collection of taxes. In *Badaracco, supra,* this Court was confronted with the question of whether the unlimited statute of limitations contained in section 6501(c)(1) applied in a case where a fraudulent return had been filed but was later corrected by an accurate amended return. The taxpayer argued the amended return superceded the earlier fraudulent return and that the three year statute of limitations contained in section 6501(a)(1) commenced to run on the filing of the amended return. To bolster his argument, the taxpayer contended that a nonliteral reading of section

6501(c) (1) was required in order to effect good tax policy. The court rejected this argument and noted the court must enforce a clear statute because "[c]ourts are not authorized to rewrite a statute because they might deem its effect susceptible of improvement." 464 U.S. at 398.

Misconstrued Silence. Moreover, the circuit court failed to correctly analyze the significance of the failure of section 6700 *et seq.* to refer to a statute of limitations. It concluded that silence in section 6703(c) as to a statute of limitations on assessments, along with a reference to a statute of limitations on collections was a clear expression of intent that Congress did not want 28 U.S.C. § 2462 to apply to section 6701 penalties.

However, an examination of section 6703(c) does not support this conclusion. The obvious purpose of the statute is to prevent the IRS from being time barred in collection by levy, etc., of a section 6701 penalty if litigation over whether the penalty is due becomes lengthy. Since even a timely assessed penalty must be collected within six years of its assessment (ten years after 1990) without the suspension of the statute of limitations on collections during litigation, the Government could actually prevail in litigation over whether a penalty was properly assessed and still be time barred to collect the penalty after the litigation. The suspension of the statute of limitations on collections has no relevance to a statute of limitations on assessments. In referring to section 6502 (the statute of limitations on *collections*), section 6703(c) makes no reference that can be construed to be relevant to a statute of limitations on the *assessment* of section 6701 penalties. Section 6502(a) states, in pertinent part, that *"[w]here the assessment of any tax imposed by this title has been made within the period of limitations properly applicable,*

such a tax may be collected by levy or by a proceeding in Court. . . . " (Emphasis added.) In other words, by referring to section 6502, section 6703(c) makes no reference to any timely assessment of penalties. Section 6502 is predicated on a timely assessment being previously made.

Additionally, Congressional intent relating to section 6703(c) cannot be judged without regard to section 6694(c), which was enacted in 1976 to provide a special set of rules for contesting penalties assessed against tax preparers. When section 6701 and related statutes, including section 6703(c), were enacted in 1982, Congress provided the same special procedures for contesting those penalties as it provided in section 6694(c). The legislative history of section 6703(c) states that it is based on section 6694(c). S. Rep. No. 97-494, 97th Cong., 2d Sess. 271 (1982), *reprinted in* 1982 U.S.C.C.A.N. 781, 1018. *In fact, the two provisions are identical.* However, when Congress enacted section 6694(c), it is clear it was not attempting to send a message in the statute that it wanted an unlimited statute of limitations to apply to the enforcement of penalties against tax preparers. Although Congress wanted an unlimited statute of limitations to apply to such penalties, it did not rely on the language of section 6694(c) to send that message. Instead, Congress simultaneously enacted Section 6696(d)(1) which states in pertinent part, *"[i]n the case of any penalty assessed under Section 6694(b), the penalty may be assessed, or a proceeding in Court for the collection of the penalty may be begun without assessment, at any time."* (Emphasis added.)

It is obvious that section 6696(d)(1) is the *"clear"* and *"affirmative"* "Act of Congress" that Congress intended to be necessary to override 28 U.S.C. § 2462. It also follows that six years later in 1982, when enacting section 6703(c),

if Congress had wanted to override 28 U.S.C. § 2462 and provide an unlimited statute of limitations for section 6701 penalties, it would not have relied on arcane implications of section 6703(c) to do so.

Similarly, the legislative history of section 6701, and related statutes, is lacking in the required *"clear"* and *"affirmative"* expression of Congressional intent. In *Mullikin, supra,* the circuit court said the legislative history did *"not offer any direct evidence as to an applicable statute of limitations."* 952 F.2d at 928 (Emphasis added.) Furthermore, by stating in the legislative history that the penalties of section 6701 are designed to discourage those who would aid others in the fraudulent underpayment of their tax, Congress did not *"affirmatively"* and *"clearly"* state that it wished to override 28 U.S.C. § 2462 and provide an unlimited statute of limitations for section 6701 penalties. Clearly, the language is not so unambiguous that it justifies the court overruling the clear and applicable language of 28 U.S.C. § 2462. While it is quite possible the circuit court could see such an implication in the legislative history of section 6701, it is only an inconclusive implication, and this Court in *Colorado River, supra,* required more to override the clear language of "[e]xcept as otherwise provided by Act of Congress".[9]

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[9] While other courts may have been justified in relying on this oblique language to conclude that the three year statute of limitations of section 6501(a) did not apply to section 6701 penalties, the circuit court is not so justified because the language of section 6501(a) in this regard is materially different from that of 28 U.S.C. § 2462. As the court in *Kuchan v. U.S., supra,* noted, section 6501(a) does not on its face apply to section 6701 penalties because the statute of limitations

(Continued on following page)

Moreover, the dissent in *Mullikin, supra,* and the opinion of the Fifth Circuit in *Core Laboratories, supra,* are correct. Even if it is necessary to look at other anti-fraud statutes to determine Congressional intent relating to section 6701, it is easier to conclude that when Congress wants an unlimited statute of limitations to apply to anti-fraud penalties, it explicitly provides for unlimited statutes of limitation. This implication of the Congressional intent from the legislative history of section 6701 is stronger than that found by the majority. Thus, the majority relied on an inconclusive and unclear implication contained in the legislative history of section 6701 to override 28 U.S.C. § 2462. That is not enough. The legislative history of section 6701 is devoid of any *"clear"* and *"affirmative"* language addressing the issue of statute of limitations. As such, it cannot be the basis to override the application of 28 U.S.C. § 2462 to section 6701 penalties.

(Continued from previous page)

contained in section 6501(a) only applies in situations where a tax return is filed, and section 6701 does not require the filing of a tax return for its provisions to apply. When confronted with a statute of limitations that did not apply on its face to section 6701 penalties, it was necessary for the court in *Kuchan, supra,* to rely on less than clear legislative history to determine Congressional intent. However, such reliance is clearly not permissible or necessary in the current case. The statute of limitations contained in 28 U.S.C. § 2462 on its face applies to section 6701 penalties. In overriding the application of 28 U.S.C. § 2462, the legislative history of section 6701 must be "affirmative" and "clear" as to applicable statutes of limitation.

II. TAX SHELTER PENALTIES SHOULD HAVE A STATUTE OF LIMITATIONS UNLESS CONGRESS HAS SPECIFICALLY PROVIDED OTHERWISE.

Introduction. This case involves questions which will determine whether thousands of professionals and others can have tax shelter penalties assessed against them without the benefit of a statute of limitations. However, Congress has not specifically enacted an unlimited statute of limitations for those penalties, and, in fact, there is a long standing five year statute of limitations which on its face applies to the penalties. To ignore the five year statute of limitations without compelling policies of tax administration would be inequitable. There are no such compelling policies. Rather, there are stronger policies that support finding that the five year statute of limitations applies to tax shelter penalties.

Tax Shelter Penalties. Pursuant to the circuit court's opinion in *Mullikin, supra,* thousands of professionals (attorneys and accountants) and other individuals (promoters, appraisers, etc.) can have substantial penalties assessed against them in regard to the tax liabilities of others without any benefit of a statute of limitations. The decision in *Mullikin, supra,* affects not only professionals and others involved with tax shelters, but also tax return preparers who have no involvement with tax shelters.

Over the past 16 years, starting with the penalties applicable to tax return preparers enacted in 1976, Congress has enacted numerous tax penalty statutes directed at professionals, etc., and the enforcement of these penalties has become a major component of federal tax administration. In 1982, the tax shelter penalties were enacted, and the IRS has pursued an aggressive program of

enforcement. This program of enforcement has resulted in the assertion of numerous penalties. For example, the Commissioner of Internal Revenue reported that 141,058 returns with tax shelter issues had been examined during 1988 with total recommended tax and penalties of $2.3 billion.[10] Although obviously all of these returns and assessments did not involve penalties under section 6701 and related statutes, the numbers do emphasize the magnitude of the potential number of tax shelter penalties involved.[11] Another example of the breadth of these issues can be seen from the fact that since 1982, there have been 456 reported decisions involving penalties under sections 6700, 6701, and 6702.

Furthermore, the importance of the questions involved here cannot be seen solely by reviewing the numbers of penalties assessed against persons involved with tax shelters. As shown by the facts of this case, section 6701 penalties can apply against persons who have nothing to do with tax shelters. Mullikin's violation related to income tax return preparation and not to a tax shelter. However, the language of section 6701 is broad enough to apply to income tax preparers, and the IRS can garner larger penalties against tax return preparers under

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[10] Commissioner's Annual Report, 1988, page 17.

[11] The IRS apparently does not keep totally accurate statistics as to the number of penalties assessed. In a recent General Accounting Office Report to the Commissioner, General Accounting Office, Tax Administration, IRS Preparer Penalty Data Inaccurate and Misleading (Aug. 15, 1990), the General Accounting Office reported the IRS is not able to accurately determine the number, amount, and type of preparer penalties.

section 6701 than under section 6694,[12] the statute specifically enacted to penalize willful or reckless tax return preparers. Therefore, if both sections 6694(b) and 6701 penalties are determined to have unlimited statutes of limitation,[13] the IRS will continue to assess the larger penalties contained in section 6701 against tax return preparers who have no involvement with tax shelters. The size of this large group can be seen from the Commissioner's statistics on the enforcement of section 6694 penalties. For example, in 1986, the IRS assessed a total of 12,065 penalties against tax return preparers.[14]

Countervailing Policies. It is inequitable to enforce these penalties against this large group without the benefit of a statute of limitations unless Congress has specifically provided an unlimited statute of limitations. However, not only has Congress failed to supply an unlimited statute, but, in fact, there is a long standing statute of limitations which on its face applies to these penalties. It is unfair and in contravention of sound legal principles to ignore this statute of limitations without compelling policies of tax administration.

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[12] For years prior to 1990, the penalty set forth in section 6694(b) was $500 for each tax return involved; whereas, the comparable penalties under section 6701 was $10,000 for each corporate document and $1,000 for each individual document. For years after 1990, the penalty under 6694(b) has been raised to $1,000 per tax return.

[13] Congress specifically provided an unlimited statute of limitations for section 6694(b) penalties in section 6696(d)(1).

[14] Commissioner's Annual Report, 1986, page 17.

There are only two policies inherent in the circuit court's opinion in *Mullikin, supra,* to support ignoring 28 U.S.C. § 2462. First, section 6701 is an anti-fraud penalty, and fraud must be discouraged. Second, statutes of limitations against the Government must be strictly construed in order to allow the Government an adequate opportunity to fairly collect taxes. However, although these policies are sound, they do not justify ignoring a plainly written statute.

Clearly, the anti-fraud character of a penalty has never before dictated that 28 U.S.C. § 2462 should not apply. Over the years, 28 U.S.C. § 2462 has been applied in numerous cases involving anti-fraud penalties, and no court has ever held that 28 U.S.C. § 2462 does not apply to such penalties or that the statute must read differently when applied to an anti-fraud penalty.[15]

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[15] *See, Arcadia Machine & Tool v. Sturm, Ruger & Co.*, 786 F.2d 1124 (Fed. Cir. 1986), where 28 U.S.C. § 2462 was applied to false patent marking statute, 35 U.S.C. § 292; *United States v. Firestone Tire and Rubber,* 518 F.Supp. 1021 (N.D. Ohio 1981), where 28 U.S.C. § 2462 applied to penalties under Gold Reserve Act of 1934 for holding gold outside United States; *Erie Basin Metal Products v. United States,* 150 F.Supp. 561 (Ct. Cl. 1957), where 28 U.S.C. § 2462 was held to apply to fraud claims under Contract Settlement Act, 41 U.S.C. § 101. It is interesting to note that *Erie Basin* penalties were asserted both under the Contract Settlement Act and the False Claims Act, 31 U.S.C. § 231, for the same alleged fraudulent acts. The Contract Settlement Act had no specific statute of limitations, but the False Claims Act contained an express six year statute of limitations. The Court held that 28 U.S.C. § 2462 applied to the Contract Settlement Act penalties but not the penalties under the False Claims Act. *See also, United States v. Dinerstein,* 226 F.Supp. 368 (E.D.N.Y. 1964); and *United States v. Goggin,* 156 F.Supp. 78 (Ct. Cl. 1957), where the courts followed *Erie Basin, supra.*

Additionally, the principle of strictly construing statutes of limitations involving the Government should not be expanded beyond what it is, i.e., a rule of statutory construction that is intended to aid in construing an ambiguous statute. It does not apply to a clearly written statute. Mertens, *Law of Federal Income Taxation*, at § 3.05. This Court's opinion in *Badaracco, supra*, does not appear to expand this rule. Nor does the rule's underlying policy justify totally ignoring a statute. Although applicable statutes of limitations against the Government should be strictly construed to aid the fair collection of taxes, there is still a public policy which underlies all statutes of limitations, i.e., to put an end to the possibility of litigation after the lapse of a reasonable and pre-determinable period of time. *See, Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 136 (1938).

Previously, this Court has held that "[a] statute of limitations is an almost indispensable element of fairness as well as practical administration of an income tax policy." *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946). In fact, in a recent district court case, *Lamb v. United States*, 779 F. Supp. 116 (W.D. Ark. 1991), the court found this principle compelling in holding that enforcement of section 6701 penalties was barred by 28 U.S.C. § 2462.

Moreover, it cannot be forgotten that what is involved in this case is not the collection of a tax, but the enforcement of a penalty. The district court in *Mullikin*, App., *infra* at 42, pointed out this distinction. It has been recognized[16] that when a statute imposes a tax which is in effect a penalty, it must be strictly construed and should not be extended to cover cases which do not fall within

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[16] Mertens, *Law of Federal Income Tax*, at § 3.53.

its letter. Because the law does not lightly impose penalties, and courts look with disfavor on forfeitures, all questions in doubt must be resolved in favor of those from whom the penalty is sought, and limitations affecting prosecution for statutory crimes must be liberally construed in favor of the defendant.[17]

In addition, even within the IRS, there is a recognition of the detriments caused by unrestricted penalty enforcement. In a recent Report on Civil Tax Penalties to the Commissioner of Internal Revenue,[18] it was noted that the overall tax compliance has been hurt by the *"adversarial tensions"*[19] that have increased over the years as tougher and tougher penalties have been enacted. In fact, this same report, written before this case was decided, recommended that section 6700 penalties be subject to an explicit statute of limitations of six years and that section 6701 should not be applicable to any act if another penalty applies to the same act.[20]

Conclusion.

Both of the reasons set forth above warrant the review of this case. The term "[e]xcept as otherwise provided by Act of Congress" is important to the orderly administration of justice. To allow a statute containing

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[17] This rule of construction has been applied by the courts in cases involving section 6700, *et seq.* penalties. *Spriggs v. United States*, 660 F.Supp. 789 (E.D. Va. 1987), aff'd, 850 F.2d 690 (4th Cir. 1988).

[18] Report on Civil Tax Penalties, Executive Task Force, Commissioner's Penalty Study (February 21, 1989).

[19] *Id.* at V-33.

[20] *Id.* at VII-48, 49.

this phrase to be overridden by less than a clear and affirmative expression of Congressional intent will seriously compromise the effectiveness of several statutes of general application. In addition, tax shelter penalties are not only large, but potentially apply to a large group of individuals. It is manifestly unfair to have these penalties to apply without the benefit of a statute of limitations, where Congress has failed to supply an unlimited statute of limitations. A decision of the circuit court in *Mullikin, supra*, dictating otherwise warrants review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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RECOMMENDED FOR FULL TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

No. 90-6456

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES M. MULLIKIN, *Plaintiff-Appellee,*	)	
v.	)	ON APPEAL from the United States District Court for the Eastern District of Kentucky
UNITED STATES OF AMERICA, *Defendant-Appellant.*	)	

Decided and filed December 30, 1991

Before: RYAN and BOGGS, Circuit Judges; and DOWD, District Judge.*

DOWD, District Judge, delivered the opinion of the court, in which RYAN, Circuit Judge, joined. BOGGS, Circuit Judge (pp. 27-28) delivered a separate opinion concurring in part and dissenting in part.

I. *INTRODUCTION*

Defendant-appellant the United States of America appeals the district court's grant of partial summary

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* The Honorable David D. Dowd, Jr., United States District Judge for the Northern District of Ohio, sitting by designation.

judgment in favor of plaintiff-appellee James M. Mullikin, Jr. ("Mullikin") in this tax refund suit. Mullikin, an accountant, prepared eight quarterly employment tax returns, Forms 941, for Vanco International, Inc. ("Vanco") for the years 1982 and 1983. Mullikin also prepared nine Wage and Tax Statements, W-2 Forms, for Vanco employees in 1982, and ten W-2 Forms in 1983. In preparing the tax documents, Mullikin failed to include the portion of wages paid to Vanco employees in cash. As a result of Mullikin's failure to include cash wages, Vanco's liability for payroll and withholding taxes, and the employees' respective tax liabilities were understated.

The Internal Revenue Service ("IRS") subsequently made the determination that Mullikin's actions with respect to the various tax forms constituted the aiding and abetting of the understatement of tax liability in violation of 26 U.S.C. § 6701 and assessed penalties against Mullikin in the total amount of $99,000.00.

Pursuant to the assessment challenge procedure set forth in 26 U.S.C. § 6703(c)(1), Mullikin paid fifteen percent of the assessed penalties within thirty days of the notices of assessment and filed claims for refund of the amounts paid. The IRS denied one claim for a refund and failed to address the second claim within the time specified by the Internal Revenue Code ("IRC"). Accordingly, Mullikin filed suit in the United States District Court for the Eastern District of Kentucky seeking a refund of the portions of the penalty assessments paid.

The parties filed cross-motions for summary judgment and on July 13, 1990, the district court sustained Mullikin's motion for partial summary judgment finding

first that the five year statute of limitations contained in 28 U.S.C. § 2462 applies to the assessment of penalties pursuant to Section 6701 and that Section 2462 barred the assessment of any penalties relating to tax forms filed more than five years before the dates of the respective notices of assessment. The district court further found that the phrase "taxable period," as used in Section 6701(b)(3), is the equivalent of calendar year and that only one penalty per person per calendar year can be assessed against an individual for violations of Section 6701. Accordingly, the district court found that even though Mullikin prepared on the designated quarterly basis four Forms 941 for Vanco in 1983, the IRS could only properly assess one $10,000.00 penalty against Mullikin for the four Forms 941 prepared for 1983.[1]

The United States appeals the district court's grant of partial summary judgment in favor of Mullikin and argues that the district court erred in both its application of the statute of limitations contained in Section 2462 to the Section 6701 penalty assessments, and in its determination that only one penalty per person per calendar year can be assessed for violations of Section 6701.

Two issues are present for our review. First, this Court must decide whether the five year statute of limitations contained in 28 U.S.C. § 2462 applies to penalty assessments made pursuant to 26 U.S.C. § 6701 for the aiding and abetting of the understatement of tax liability.

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[1] The district court found that Mullikin was liable for $20,000.00 in penalty assessments representing the total of $1,000.00 each for the ten W-2 Forms and $10,000.00 for the Forms 941.

Second, the Court must determine whether only a single penalty per person per calendar year is properly assessable under Section 6701 or whether a separate penalty may be assessed for each of four false quarterly Forms 941 prepared.

For the reasons set forth below, the Court finds that the district court erred in applying the five year statute of limitations contained in 28 U.S.C. § 2462 to the assessment of penalties pursuant to Section 6701. Accordingly, the Court reverses that portion of the district court's opinion finding the assessments for the tax forms relating to 1982 barred by the statute of limitations found in Section 2462. The Court further finds that the district court erred in its determination that the IRS could only assess one $10,000.00 penalty against Mullikin for the four Forms 941. The Court reverses the judgment of the district court and remands the case to the district court with specific instructions that the district court issue an order in accordance with this Court's opinion.

II. *FACTS*

Plaintiff-appellee Mullikin was engaged in the practice of providing accounting services. In the performance of his profession, Mullikin prepared IRS Forms 941, Employer's Quarterly Federal Tax Returns, for Vanco for the eight calendar quarters of 1982 and 1983.[2] Mullikin

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[2] Mullikin prepared the Forms 941 for the calendar quarters ending March 31, 1982, June 30, 1982, September 30, 1982, December 31, 1982, March 31, 1983, June 30, 1983, September 30, 1983, and December 31, 1983.

also prepared nine W-2 Forms, Wage and Tax Statements, for Vanco employees for the 1982 calendar year and ten W-2 Forms for Vanco employees for the 1983 calendar year. The IRS subsequently determined that Mullikin, in preparing the Forms 941 and the W-2 Forms, omitted cash compensation paid to Vanco employees; this omission resulted in the understatement of Vanco's employment tax liability and the employees' income tax liability.

The IRS determined that Mullikin's actions constituted the aiding and abetting of the understatement of tax liability within the meaning of 26 U.S.C. § 6701[3] and proceeded to assess penalties against Mullikin for each of the documents prepared. In Notices of Penalty Charge dated November 14, 1988, the IRS notified Mullikin that he had been charged with penalties pursuant to Section 6701 for the nineteen W-2 Forms. Mullikin was assessed $9,000.00 in penalties for the W-2 Forms for calendar year 1982, and $10,000.00 in penalties for the W-2 Forms for calendar year 1983, representing the total of $1,000.00 each for the nineteen W-2 Forms prepared by Mullikin.

On November 21, 1988, the IRS set Mullikin Notices of Penalty Charge in the amount of $80,000.00 representing the total of $10,000.00 each for the eight Forms 941 prepared. The total amount of penalties assessed against Mullikin pursuant to Section 6701 was $99,000.00.

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[3] The text of 26 U.S.C. § 6701 is set forth below in the Court's opinion.

Pursuant to Section 6703(c)[4], Mullikin paid fifteen percent of the amount of the penalties assessed against him within thirty days of the notices of penalty assessment and filed claims for refunds.[5]

The IRS notified Mullikin in a letter dated May 15, 1989, that his claims for refund of the money paid with respect to the penalties relating to the Forms 941 were denied. Then, on June 13, 1989, within thirty days of the denial of his claim for a refund, Mullikin filed his complaint in the United States District Court for the Eastern District of Kentucky, seeking a refund of the $12,000.00 and an injunction against collection of the remainder of the penalties.[6]

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[4] The text of 265 U.S.C. § 6703 is set forth below in the Court's opinion.

[5] On December 13, 1988, Mullikin paid to the IRS $2,850.00, fifteen percent of the penalties assessed on November 14, 1988. Plaintiff paid the IRS $12,000.00 on December 20, 1988, fifteen percent of the penalties assessed on November 21, 1988. Mullikin timely filed claims for refunds along with the payments.

[6] In his original complaint, Mullikin argued that his actions did not constitute the aiding and abetting of the understatement of tax liability. Mullikin also initially argued that the statute of limitations contained in Section 6501(a) bars the assessment of the penalties because the returns were filed more than three years prior to the assessment of the Section 6701 penalties. In addition, Mullikin argued that Section 6701 limits the assessment of penalties to one penalty per person for any taxable period and the assessment of separate penalties for the four Forms 941 exceeded that limit.

Mullikin did not receive a response within six months to his claims for refund filed on December 13, 1988. Accordingly, he filed an amended complaint on June 16, 1989, demanding an additional refund in the amount of $2,850.00.

On January 25, 1990, Mullikin filed a motion for partial summary judgment in which he argued that, as a matter of law, he is only liable for $20,000.00 of the penalties assessed against him. In his motion, Mullikin argued that: (1) the five year statute of limitations contained in 28 U.S.C. § 2462[7] bars the penalty assessments relating to actions taken more than five years before the dates of the IRS penalty notices, and (2) only one penalty may be assessed with respect to any one taxpayer for any taxable period and that therefore three of the four assessments relating to the Forms 941 made for each of the calendar years 1982 and 1983 are barred.

The United States filed a cross-motion for summary judgment on March 14, 1990 in which the United States argued that it is entitled to the full $99,000.00 of assessed penalties because no statute of limitations applies to the assessment of Section 6701 penalties and the limitation of one penalty for any taxable period refers, in the case of Forms 941, to calendar quarters, not the calendar year.

The district court issued its memorandum opinion and order addressing the cross-motions for summary judgment on July 13, 1990. The district court found first

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[7] The text of 26 U.S.C. § 2462 is produced below in the Court's opinion.

that the five year statute of limitations contained in 28 U.S.C. § 2462 applies to the assessment of penalties pursuant to Section 6701 and accordingly sustained Mullikin's motion for partial summary judgment on those penalties assessed on tax forms filed more than five years before November 14, 1988 or November 21, 1988. The district court next found that only one penalty per person per calendar year can be assessed pursuant to Section 6701 and found that Mullikin should be liable for only one $10,000.00 penalty in the remaining year for which the assessments were not time-barred.

The United States filed its notice of appeal of the district court's decision on November 13, 1990.

III. *DISCUSSION*

A. *Statute of Limitations.*

The Court begins by addressing the issue of whether the statute of limitations contained in Section 2462 applies to penalty assessments made pursuant to Section 6701. 28 U.S.C. § 6701 provides as follows:

> **(a) Imposition of penalty.** – Any person –
>
> (1) Who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion of a return, affidavit, claim, or other document,
>
> (2) Who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) Amount of penalty. –

(1) In general. – Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) Corporations. – If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) Only 1 penalty per person per period. – If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event) . . .

26 U.S.C. § 6703 sets forth the rules which are applicable to penalties under, *inter alia*, Section 6701.[8] Neither Section

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[8] 26 U.S.C. § 6703 provides:

(a) Burden of proof. – In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issues shall be on the Secretary.

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6701 nor Section 6703 contain an express statute of limitations to govern the timing of assessments of penalties

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(b) Deficiency procedures not to apply. –Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment or collection of the penalties provided by sections 6700, 6701, and 6702.

(c) Extension of period of collection where person pays 15 percent of penalty. –

(1) In general. – If, within, 30 days after the day on which notice and demand of any penalty under section 6700 or 6701 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) Person must bring suit in district court to determine his liability for penalty. – If, within 30 days after the day on which his claim for refund or any partial payment of any penalty under section 6700 or 6701 is denied (or, if earlier, within 30 days after the expiration of 6

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pursuant to Section 6701. In the absence of an express statute of limitations, this Court must determine whether Congress intended that a statute of limitations apply to the assessment of penalties pursuant to Section 6701, and, if the Court determines that Congress so intended, what statute of limitations Congress intended to apply.

The district court found that since Congress did not expressly provide for a statute of limitations on Section 6701 assessments, the five year statute of limitations provided for in 28 U.S.C. § 2462 applies by default. 28 U.S.C. § 2462 provides as follows:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from

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> months after the day on which he filed the claim for refund), the person fails to begin a proceeding in the appropriate United states district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.
>
> **(3) Suspension of running of period of limitations on collection.** – The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462(1988).

The parties to this appeal make the following arguments regarding the statute of limitations issue. The United States argues first that no statute of limitations is provided for in Section 6701 and therefore no statute of limitations applies to the assessment of penalties pursuant to Section 6701. In this regard, the United States contends that no statute of limitations applies to causes of action in favor of the government unless Congress expressly so provides. The United States further argues that any statute of limitations sought to be applied against the United States must receive a strict construction in the government's favor; if such a strict construction is provided, the United States argues, 28 U.S.C. § 2462 should not be found applicable to assessments pursuant to Section 6701. The United States contends that an assessment of a penalty pursuant to Section 6701 can be made at any time.

The United States makes the second argument that Section 2462 is inapplicable because an assessment is not the equivalent of an action, suit or proceeding for the enforcement of a civil penalty but rather is a purely administrative act. Finally, the United States makes the argument that Section 2462 is inapplicable because that provision only applies when Congress has not otherwise provided for a statute of limitations. In the case of Section 6701 penalties, the United States contends, Congress has

otherwise provided for a 6-year statute of limitations in 26 U.S.C. § 6502.[9] Section 6502, the United States argues, provides for a 6-year statute of limitations within which to bring an action to enforce a penalty following the assessment of the penalty. The penalty can, however, be assessed at any time.

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[9] 26 U.S.C. § 6502 provides as follows:

> **(a) Length of period.** – Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun –
>
> **(1)** within 6 years after the assessment of the tax, or
>
> **(2)** prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release) . . .
>
> The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If a timely proceeding in court, for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes enforceable.
>
> **(b) Date when levy is considered made.** – The date on which a levy on property or rights to

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Mullikin argues that where Congress has not otherwise so provided, 28 U.S.C. § 2462 provides a catch-all statute of limitations that applies to the government's attempts to collect penalties, including both administrative actions and judicial proceedings to enforce penalties. Mullikin contends that the assessments for 1982 are barred because the United States did not commence any of its enforcement proceedings until after the statute of limitations had run on the claims for activities in 1982, and accordingly, the district court properly granted him partial summary judgment.

The general rule, as set forth by the Supreme Court in *Dupont DeNemours & Co. v. Davis*, 264 U.S. 456 (1924), is that "[a]n action on behalf of the United States in its governmental capacity . . . is subject to no time limitation, in the absence of congressional enactment clearly imposing it." *Id.* at 462 (citations omitted); *United States v. Weintraub*, 613 F.2d 612, 619 (6th Cir. 1979) (court stating that "[w]hile the general rule . . . is that the sovereign is exempt from the operation of statutes of limitations, an exception to that general rule exists when the sovereign (through the legislature) expressly imposes a limitation

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property is made shall be the date on which the notice of seizure provided in section 6335(a) is given.

The Court notes that Section 6502 was recently amended to extend the limitations period from six to ten years. *See*, 26 U.S.C.A. § 6502 (West Supp. 1991). The new ten year period applies to taxes assessed after November 5, 1990 and taxes assessed before that date if the period for collection had not expired as of November 5, 1990. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388, § 11317.

period upon itself") (citations omitted). Likewise, if a statute of limitations is sought to be applied against the United States, the statute of limitations must receive a strict construction in favor of the government. *Badaracco v. Commissioner*, 464 U.S. 386, 398, (1984) (quoting *Dupont DeNemours & Co.*, 264 U.S. 456, 462 (1924)).

This Court has not come across any other cases that have addressed the issue of whether the statute of limitations set forth in Section 2462 applies to the assessment of penalties pursuant to Section 6701. Several other courts have, however, addressed the issue of whether the general three year statute of limitation on the assessment and collection of taxes, 26 U.S.C. § 6501(a)[10], applies to penalties assessed pursuant to either Section 6701 or Section 6700[11] and have found the three year statute of limitations in Section 6501(a) inapplicable. *See, e.g., Sage v.*

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[10] 26 U.S.C. § 6501 provides in pertinent part as follows:

> **(a) General rule.** – Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return was filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period . . .

[11] Section 6700 provides for the assessment of penalties for the promotion of abusive tax shelters and was enacted along with Section 6701.

United States, 908 F.2d 18 (5th Cir. 1990) (Court holding that Section 6700 is untrammeled by any statutory time-bar and laches alone is the only possible curb on the IRS's power to assess Section 6700 penalties); *Emanuel v. United States*, 705 F. Supp. 434 (N.D. Ill. 1989) (court finding that the statute of limitations contained in Section 6501(a) does not apply to penalties assessed under either Section 6700 or Section 6701); *Agbanc, Ltd. v. United States*, 707 F. Supp. 423 (D. Ariz. 1988) (court finding that Section 6501(a) is inapplicable to Section 6700 penalties); *Kuchan v. United States*, 679 F. Supp. 764 (N.D. Ill. 1988) (court stating that "Congress did not intend that § 6501(a) apply to the assessment of penalties under § 6701. Rather, § 6701 is analogous to other sections enacted to combat fraud which provide unlimited periods of limitation"). Although the above-cited cases addressed whether the statute of limitations contained in Section 6501(a) rather than whether the statute of limitations contained in Section 2462 is applicable, the Court finds the analyses of the several cases useful in resolving the present appeal.

In *Sage v. United States*, 908 F.2d 18 (5th Cir. 1990), the Court held that the three year statute of limitations contained in Section 6501(a) does not apply to the assessment of Section 6700 penalties. *Id.* at 25. In that case, the plaintiff argued that the statute of limitations in Section 6501(a) for the assessment of any tax applies because Section 6671(a)[12], appearing with Section 6700 in the

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[12] 26 U.S.C. § 6671(a) provides, in pertinent part:

> **(a) Penalty assessed as tax.** – The penalties and liabilities provided by this subchapter shall be paid

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assessable penalties portion of the Code – Subchapter B – provides that the assessable penalties of that part of the Code shall be assessed and collected in the same manner as taxes and any reference to "tax" shall also be reference to the penalties and liabilities provided by Subchapter B. *Id.* at 23. The plaintiff in *Sage* argued that because Section 6700 penalties are to be assessed in the same manner as taxes, the same statute of limitations that applies to assessments of taxes should apply to the assessment of Section 6700 penalties. The plaintiff in *Sage* further contended that the general 6-year statute of limitations on collection applies to Section 6700 penalties by virtue of the direct reference to Section 6502 in Section 6703(c). The plaintiff argued that because the 6-year statute of limitations on the collection of any penalty is expressly made applicable through Section 6703(c), a statute of limitations on assessments must necessarily apply since Section 6502 speaks in terms of the assessment of the penalty having been made within the period prescribed for the assessment.

The Fifth Circuit in *Sage* declined to adopt the plaintiff's arguments and instead found that "[j]ust as with other provisions of the Code enacted to combat fraud no limitations period exists for assessment of a Section 6700 penalty, and consequently no period of limitations is 'properly applicable thereto'. An assessment made at any time will trigger the Section 6502 period of limitations on

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> upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter . . .

collection." *Id.* at 25. The Fifth Circuit further commented that:

> Sage's argument in behalf of Section 6501(a)'s reach, though imaginative, depends too greatly on a filigree of interpretation too overworked to combat the stolid interpretation offered by the government. The government's position, with which we entirely agree, is that nothing in the code cuts down the power of Section 6700, that that Section's concentration on capturing transactional fraud whenever occurring removes it from the stolid tax-return dependent world of Section 6501(a), and that, in any event . . . it is not self-evident when the limitations period should begin to run. Our holding today doubtless falls athwart the fond hopes of many a taxpayer and it is, perhaps, cold comfort to note that the doctrine of laches does remain – the only curb on IRS penalty-assessment power under Section 6700.

Id.[13]

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[13] The District Court for the District of Arizona faced the issue of the applicability of the Section 6501(a) three year statute of limitations to penalty assessments under Section 6700 in *Agbanc, Ltd. v. United States,* 7078 F. Supp. 423 (D. Ariz. 1988). In *Agbanc,* the Court held that assessments under Section 6700 were not barred by a statute of limitations. *Id.* at 426. The Court explained:

> Section 6700 contains no specific statute of limitations and this Court is unwilling to construe the 3 year limitation period in Section 6501(a) for assessing taxes as a general statute of limitations. Section 6501(a) depends upon the filing of a tax return to

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The Court in *Kuchan v. United States*, 679 F. Supp. 764 (N.D. Ill. 1988) found, in addressing the issue of whether the statute of limitations in Section 6501(a) is applicable to Section 6701 penalties, that "[t]he main problem with applying § 6501(a) to penalties imposed under § 6701 is that § 6501(a) depends for its operation upon the filing of a tax return and, . . . § 6701 imposes no such requirement. Additionally, § 6703 entitled 'Rules applicable to penalties under sections 6700, 6701, and 6702' makes no mention of any statute of limitations for § 6501." *Id.* at 768.

The above-cited cases, while not expressly addressing the applicability of Section 2462 to Section 6701 penalty assessments, seem to stand for the proposition that Congress intended that penalties can be assessed pursuant to Sections 6700 and 6701 at any time. The Courts arrived at this conclusion by noting the absence of an express limitations period and the fact that Sections 6700 and 6701 are anti-fraud provisions in which Congress typically provides for unlimited periods of assessment.

The Court finds that Congress did not intend that the statute of limitations contained in Section 2462 apply to

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> begin the running of the limitations period. To the contrary, Section 6700 assessments do not depend on the filing of a tax return. Rather, assessment of 6700 penalties occur after the IRS becomes aware that an individual's activities are prohibited by Section 6700. As a practical matter, it would be difficult to ascertain when the limitation period should begin to run, i.e. when the prohibited activity took place or when the IRS became aware of the activity.

Id. at 426-27.

the assessment of penalties pursuant to Section 6701. As was emphasized above, the statute itself is silent as to a period of limitations. The legislative history behind the enactment of Section 6701 does not offer any direct evidence regarding the intent of Congress as to an applicable statute of limitations. However, the legislative history does shed some light on the purpose behind the statute's enactment. Senate Report Number 97-494 provides that:

> First, the penalty will permit more effective enforcement of the tax laws by discouraging those who would aid others in the fraudulent underpayment of their tax. Second, it is inappropriate to impose sizeable [sic] civil fraud penalties on taxpayers but allow the advisors who aid or assist in the underpayment of tax to escape civil sanctions . . . Finally, the committee believes the new penalty will help protect taxpayers from advisors who seek to profit by leading innocent taxpayers into fraudulent conduct.

S. Rap. No. 97-494, 97th Cong., 2d Sess. 275, 1982 U.S. Code Cong. & Admin. News 781, 1022. This excerpt from the legislative history indicates that Congress was interested in combatting fraud by imposing penalties on individuals who aid in the fraudulent underpayment of taxes. The legislative history signifies to this Court that it is appropriate to interpret this provision in light of other anti-fraud provisions of the Code.

In other antifraud provisions in the Internal Revenue Code, Congress has provided for unlimited periods within which to assess penalties. For example, 26 U.S.C.

§ 6501(c)(1) and (2)[14] provide that in the case of the filing of a false or fraudulent return with the intent to evade tax, or a willful attempt to evade tax, the tax may be assessed, or a proceeding in court for collection of the tax may be begun without assessment at any time. Likewise, 26 U.S.C. § 6696(d)(1)[15] provides for an unlimited period of assessment or collection of a penalty imposed pursuant

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[14] 26 U.S.C. § 6501(c)(1) and (c)(2) provide as follows:

> **(1) False return.** – In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.
>
> **(2) Willful attempt to evade tax.** – In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

[15] 26 U.S.C. § 6696(d)(1) provides:

> **Assessment.** – The amount of any penalty under section 6694(a) or under section 6695 shall be assessed within 3 years after the return or claim for refund with respect to which the penalty is assessed was filed, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. In the case of any penalty under section 6694(b), the penalty may be assessed, or a proceeding in court for the collection of the penalty may be begun without assessment, at any time.

to 26 U.S.C. § 6694(b)[16] for the willful or reckless conduct of a tax return preparer in understating an individual's tax liability with respect to any return or claim for refund.

The United States argues that Congress' failure to include a statute of limitations is evidence of its intent that no statute of limitations apply, especially since Section 6701 is an anti-fraud provision of the Code and Congress typically provides for unlimited periods of assessment in anti-fraud provisions. Mullikin argues, in contrast, that Congress' failure to include an express unlimited statute of limitations is evidence that Congress intended some limitary period to apply to Section 6701 penalties because when Congress wants to provide for express unlimited limitations periods, it does so.

Although the Court recognizes that there may be some force to Mullikin's argument, the Court is of the

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[16] 26 U.S.C. § 6694(b) provides as follows:

> **(b) Willful or reckless conduct.** – If any part of any understatement of liability with respect to any return or claim for refund is due –
>
> (1) to a willful attempt in any manner to understate the liability for tax by a person who is an income tax return preparer with respect to such return or claim, or
>
> (2) to any reckless or intentional disregard of rules or regulations by any such person,
>
> such person shall pay a penalty of $1,000 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

view that Section 6701 should be interpreted in light of the purposes behind its enactment and the way in which Congress has treated penalty assessments for other anti-fraud provisions of the Code. These considerations, as well as additional considerations set forth below, lead the Court to the conclusion that no statute of limitations applies to Section 6701 penalty assessments.

As was noted above, the government is not subject to a statute of limitations on a cause of action in its favor unless the government expressly so provides. Likewise, a statute of limitations sought to be applied to bar a claim of the government must receive a strict construction. Section 2462, by its express terms, applies only in instances in which Congress has not otherwise provided for a statute of limitations; in the case of Section 6701 penalties, the Court finds that Congress has otherwise provided for a statute of limitations within the Internal Revenue Code and therefore, Section 2462 has no application.

It is the Court's view that it was the intent of Congress in enacting Section 6701 that there be no statute of limitations governing the assessment of penalties pursuant to Section 6701; once an assessment is made, however, the statute of limitations on the collection of assessed taxes set forth in Section 6502 applies. This Court construes Section 6701 in light of other anti-fraud provisions and finds that Congress intended that no limitations period apply to initial assessments of Section 6701 penalties. Application of Section 2462 to Section 6701 penalties is therefore contrary to the intent of Congress.

Section 6703(c), the statutory provision setting forth the rules applicable to penalties assessed pursuant to, *inter alia*, Section 6701, makes express reference to the suspension of the running of the period of limitations on collection provided in Section 6502. This express reference to Section 6502 within Section 6703(c) signifies to the Court that it was Congress' intent that a statute of limitations would come into play only upon an attempt to collect assessed penalties and that no statute of limitations would apply to the initial assessment of penalties.

Although this may seem a harsh result, the result is in accordance with jurisprudence regarding the applicability of statutes of limitations to causes of action in favor of the government. The result also furthers the interests of Congress in combatting fraud relating to the filing of various tax documents. It is not the duty of this Court to write statutes of limitations into statutes; rather, that is the duty of Congress.

The Court finds, for reasons set forth above, that the district court erred in applying the five year statute of limitations contained in Section 2462 to the assessment of penalties by the IRS pursuant to Section 6701. No statute of limitations is applicable to the assessment of Section 6701 penalties and consequently, such penalties may be assessed at any time.[17]

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[17] In light of the fact that the Court has found that Section 2462 is inapplicable to the assessment of penalties pursuant to Section 6701 because the intent of Congress was that no statute of limitations would apply to the initial assessment of penalties, the Court need not address the arguments raised by the

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B. *One Penalty Per Person Per Taxable Period.*

The Court next addresses the issue of whether the district court erred in finding that only one penalty per taxpayer per calendar year was properly assessable against Mullikin for the four Forms 941. Section 6701(b)(3) provides as follows:

> **(b) Amount of penalty. –**
>
> **(3) Only 1 penalty per person per period.** – If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

26 U.S.C. § 6701(b)(3) (1988).

The United States argues that the legislative history sheds no light on the meaning of the phrase "taxable period" but that the use of this phrase as opposed to the phrase "taxable year" clearly indicates that Congress did not intend to preclude the imposition of more than one penalty per calendar year in the case of taxes that are required to be reported and are assessed on a quarterly basis. Mullikin argues, on the other hand, that penalties are disfavored in the law and therefore any doubts concerning a penalty provision should be resolved in favor of those from whom the penalty is sought. Mullikin further argues that the Treasury Regulations provide that if a

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government that Section 2462 does not bar an assessment because an assessment is a purely administrative act and not an action, suit or proceeding for the enforcement of any civil penalty within the meaning of Section 2462.

District Director so decides, an employer can be required to file its Forms 941 monthly, instead of quarterly, and if the United States' interpretation of the phrase "taxable period" is adopted, an individual could conceivably be assessed penalties in the amount of $120,000.00. The district court made reference to this latter argument raised by Mullikin in arriving at its conclusion that the phrase "taxable period" is the equivalent of "taxable year."

The statute itself does not explain the meaning of the phrase "taxable period" or whether the phrase "taxable period" is distinguishable from the phrase "taxable year." The legislative history is likewise of little help. The penalty provision is explained as follows:

> This penalty, which is $1,000 for each return or other document ($5,000 in the case of returns and documents relating to the tax of a corporation) can be imposed whether or not the taxpayer knows of the understatement. The penalty can, however, be imposed only once for any taxable period (or taxable event) with respect to the taxpayer's actions in assisting any one person. Thus, someone who assists two individuals in preparing false documents would be liable for a $2,000 penalty whereas the penalty would be only $1,000 if he had advised in the preparation of two false documents for the same taxpayer.

S. Rep. No. 97-494, 97th Cong., 2d Sess. 276, 1982 U.S. Code Cong. & Admin. News 781, 1022. This passage from the legislative history is ambiguous at best and can be interpreted to support either party's position regarding the meaning of the phrase "taxable period."

The Court has uncovered no cases directly addressing the issue of whether Section 6701(b)(3) allows for the assessment of separate penalties for each of four quarterly false Forms 941 filed in a particular calendar year. Several courts have, however, generally addressed the meaning of the Section 6701(b)(3) penalty provision. The Eighth Circuit recently addressed the meaning of this statutory provision in *Mattingly v. United States*, 924 F.2d 785 (8th Cir. 1991), a case in which Section 6701 penalties were assessed against the defendant-appellant for forty-six 1983 tax returns prepared by the defendant and eight carry-over returns prepared by defendant claiming tax credits that originated in 1983. *Id.* at 786. The Court in *Mattingly* addressed the issue of whether the IRS could properly assess penalties based on the carryover returns as well as the tax returns.

The Court held in this regard that "when a § 6701 penalty is imposed with respect to an understatement document in one tax period, another penalty may not be imposed on a carryover document on the same taxpayer, based on the same original understatement." *Id.* at 793. In arriving at is conclusion, the Court stated that "[t]he provision clearly states that separate penalties may be imposed for violations involving different taxpayers in the same year. It is also clear that separate penalties may not be imposed for multiple documents in the same year involving the same taxpayer." *Id.* at 793. The Court determined that penalties could not properly be assessed for documents that related to the same taxpayer in the same taxable period or event. *Id.* The Court in *Mattingly* seemed to assume that the phrase "taxable period" was

the equivalent of taxable year because the documents related to individual tax returns.

In another case that briefly addresses the issue of the number of penalties that may be assessed pursuant to Section 6701, *Emanuel v. United States,* 705 F. Supp. 434 (N.D.Ill. 1989), the IRS assessed penalties against an individual for allegedly preparing or assisting in preparing sixty investors' income tax returns for the 1982 tax year as well as for tentative refunds carrying back unused tax credits to the years 1979 and 1980, and in one year carrying over to year 1983. The plaintiff alleged that the penalties based on the refund documents (Form 1045) were improper because they related to the 1982 tax period and the plaintiff was already penalized once for documents relating to the same individuals for the same period. The government made the argument that the 1045 Forms are treated as amendments to prior tax returns and therefore relate to the taxable period for which they act as amendments. The Court found, however, that "the documents at issue *relate* to the 1982 tax period, not the year for which [sic] it acts as an amendment . . . Because the documents in issue here 'relate to' the year ended December 31, 1982, the government improperly computed the Section 6701 penalty." *Id.* at 438. Like the Court in *Mattingly,* the Court in *Emanuel* seemed to use the phrase "taxable period" to refer to "calendar year." However, in both cases, the documents related to the filing of individual income tax returns which necessarily relate to a particular calendar year. In contrast, the documents in the present case related to quarterly employment tax returns.

The Court finds, for the following reasons, that the district court erred in holding that the IRS improperly assessed separate penalties for each of the four Forms 941

prepared by Mullikin for the four quarters of 1982 and 1983. While the issue is certainly not free from debate, the Court concludes that by utilizing the phrase "taxable period," or if no taxable period then "taxable event," Congress intended to provide for the assessment of separate penalties for documents relating to quarterly employment tax filings. When enacting Section 6701, Congress certainly was aware of the Treasury Regulations providing for the quarterly,[18] or in some circumstances

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[18] Treasury Regulation § 31.6071(a)-1 provides:

> **(a) Federal Insurance Contributions Act and income tax withheld from wages – (1) Quarterly or annual returns.** Except as provided in subparagraph (4) of this paragraph each return required to be made under § 31.6011(a)-4, in respect of income tax withheld, shall be filed on or before the last day of the first calendar month following the period for which it is made. However, a return may be filed on or before the 10th day of the second calendar month following such period if timely deposits under section 6302(c) of the Code and the regulations thereunder have been made in full payment of such taxes due for the period. For the purpose of the preceding sentence, a deposit which is not required by such regulations in respect of the return period may be made on or before the last day of the first calendar month following the close of such period, and the timeliness of any deposit will be determined by the earliest date stamped on the applicable deposit form by an authorized financial institution or by a Federal Reserve bank.
>
> **(2) Monthly tax returns.** Each return in respect of the taxes imposed by the Federal Insurance Contributions Act or of income tax withheld which is required to be made under paragraph (a) of § 31.6011(a)-5 shall be filed on or before the fifteenth day of the first calendar month following the period for which it is made.

monthly,[19] filing of employment tax returns. By use of the phrase "taxable period," it is the Court's view that Congress intended to provide for the assessment of separate penalties for documents that relate to separate quarterly tax returns. As the United States aptly points out, if Congress had intended that taxable period mean taxable year, then Congress would have clearly so stated.

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[19] Treasury Regulation § 31.6011(a)-5 provides, in pertinent part:

> **(a) In general – (1) Requirement.** The provisions of this section are applicable in respect of the taxes reportable on Form 941, From 941PR, or Form 941VI pursuant to § 31.6011(a)-1 or § 31.6011 (a)-4. An employer who is required by § 31.6011(a)-1 or § 31.6011(a)-4 to make quarterly returns on any such form shall, in lieu of making such quarterly returns, make returns of such taxes in accordance with the provisions of this section if he is so notified in writing by the district director. The district director may so notify any employer (i) who, by reason of notification as provided in § 301.7512-1 of this chapter (Regulations on Procedure and Administration), is required to comply with the provisions of such § 301.7512-1, or (ii) who has failed to (a) make any such return on Form 941, Form 941PR, or Form 941VI, (b) pay tax reportable on any such form, or (c) deposit any such tax as required under the provisions of § 31.6302(c)-1. Every employer so notified by the district director shall make a return for the calendar month in which the notice is received and for each calendar month thereafter (whether or not wages are paid in any such month) until he has filed a final return or is required to make quarterly

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The Court certainly recognizes the valid concern raised by plaintiff and the district court of the potential enormity of the penalties that could be assessed under Section 6701 and the potential for disproportionality between the penalties that could be assessed against an individual preparing tax documents for an employer required to make monthly filings versus the penalties that could be assessed against an individual preparing tax documents for an employer only required to make quarterly filings. It is this Court's duty, however, to follow Congress' intent when interpreting statutes and not to rewrite the statute in a way that this Court finds just. Congress chose to provide for the possibility of multiple penalties being assessed against an individual during a given year. Even if this Court were to disagree with this result, the Court would be bound to give effect to the statute as written. The Court additionally notes that although Mullikin's proportionality argument has some

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returns pursuant to notification as provided in subparagraph (2) of this paragraph.

. . .

(2) Termination of requirement. The district director, in his discretion, may notify the employer in writing that he shall discontinue the filing of monthly returns under this section. If the employer is so notified, the last month for which a return shall be made under this section is the last month of the calendar quarter in which such notice of discontinuance is received. Thereafter, the employer shall make quarterly returns in accordance with the provisions of § 31.6011(a)-1 or § 31.6011(a)-4.

appeal, the government's counter argument to the effect that Congress would not have intended to immunize an individual who aids or assists a particular taxpayer in filing a series of false or fraudulent returns during a given calendar year from liability for more than one penalty, is of at least equal weight.

For the above-stated reasons, the Court finds that the district court erred in holding that the IRS could only properly assess one $10,000.00 penalty per calendar year against Mullikin for the filing of the four Forms 941. Contrary to the decision of the district court, this Court finds that Congress, in utilizing the phrase "taxable period," did not intend to limit the IRS to the assessment of only one penalty per calendar year. Rather, the Court finds that the IRS can properly assess a separate $10,000.00 penalty against Mullikin for each of the false Forms 941 prepared for the four quarters of 1982 and 1983.

The Court reverses the district court's grant of partial summary judgment in favor of Mullikin to the extent that the grant was based on the district court's determination that the IRS could only assess one $10,000.00 penalty against Mullikin based on the false Forms 941.

IV. *CONCLUSION*

In sum, the Court finds that the district court erred in applying the five year statute of limitations contained in 28 U.S.C. § 2462 to the assessment of penalties by the IRS pursuant to 26 U.S.C. § 6701. The Court further finds that the district court erred in finding that the IRS could only

assess one $10,000.00 penalty against Mullikin per calendar year for the filing of the four Forms 941 in 1982 and 1983.

The Court reverses the district court's judgment and remands this case to the district court with specific instructions that the district court issue an order in accordance with the decision of this court.

The judgment of the district court is hereby REVERSED and the case REMANDED for judgment in accordance with the decision of this Court.

BOGGS, Circuit Judge, concurring in part and dissenting in part. I concur in part III. B of the court's opinion. However, I dissent from part III. A and would hold that a five-year statute of limitations applies to bar penalties for any action more than five years before the penalty assessments were made. The reasoning for applying the five-year statute of limitations of 28 U.S.C. § 2462 to the assessment of penalties in this case is quite straightforward. Section 2462 provides a catchall statute of limitations for all cases where the Internal Revenue Code does not otherwise provide such a statute (which includes, presumably, an explicitly unlimited period for prosecution). The parties all agree that the penalty assessment sections of 26 U.S.C. § 6701 contain no explicit statute of limitations.

The court's opinion argues at great length, and ably summarizes at pages 18-19, reasons why no statute of limitation *should*, in general theory, apply to the situation in this case. However, the two reasons so ably advanced:

(1) statutes of limitations against actions by the government are not usually favored; and, (2) statutes of limitations do not generally apply to sections combating fraud, are both reasons that simply demonstrate why Congress *might* have not enacted a specific statute of limitations for the section in question.

However, in enacting 28 U.S.C. § 2462, the Congress *did* provide a statute of limitations that applies to cases brought by the government, and it did provide a statute of limitations that had effect over every section within its compass, whether or not that section could be construed as an antifraud provision. Section 2462 simply makes no such exception. By its own terms, it applies to proceedings to enforce "any civil . . . penalty," "[e]xcept as otherwise provided by act of Congress. . . . " Therefore, I cannot agree with the court's ingenious interpretation that what is clearly a "catchall" statute does not in fact catch a clearly relevant section. I would hold that this section applies and that the IRS's action for penalty assessments against Mullikin is time-barred with regard to these penalties.[1]

---

[1] At page 20, footnote 17, the court's opinion states that there is no need to address the argument that § 2462 could not apply as a bar to an action on a penalty assessment because such assessment was neither an "action" nor a "proceeding for the enforcement of any civil penalty." I would reject this argument because the assessment is a prerequisite to, and thus part of, the measures for the enforcement of a civil penalty. It would seem quite odd to say that the very act that initiates the actions leading to the collection of the penalty, a stream of events that must at some point be a proceeding, is not itself part of the proceeding.

It is particularly notable that many antifraud provisions explicitly provide for an unlimited statute of limitations. *See, e.g.*, 26 U.S.C. § 6501(c)(1) and (2); 26 U.S.C. § 6696(d)(1). Thus, the failure to include such an unlimited period in § 6701 is additional evidence that the explicit words of the catchall provision should apply. Indeed, it is ironic that the court refers, at page 18, to the concession by the IRS that "Congress[] fail[ed] to include . . . a statute of limitations" in § 6701, yet on the very next page it "finds that Congress has otherwise provided for a statute of limitations. . . . "

No. 90-6456

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M. MULLIKIN, JR.
Plaintiff-Appellee,

v.

UNITED STATES OF AMERICA,
Defendant-Appellant.

ORDER

(Filed Mar. 13, 1992)

BEFORE: RYAN and BOGGS, Circuit Judges; and DOWD,* United States District Judge.

The court having received a petition for rehearing en banc, and the petition have been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER
OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

*Hon. David D. Dowd, Jr. sitting by designation from the Northern District of Ohio

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 89-257

JAMES M. MULLIKIN, JR., PLAINTIFF,

VS.

UNITED STATES OF AMERICA, DEFENDANT.

MEMORANDUM OPINION AND ORDER

(Filed July 13, 1990)

This matter is before the court upon the motion of the plaintiff, James M. Mullikin, Jr., for partial summary judgment, and upon the cross-motion for summary judgment filed by the defendant, the United States of America. Responses and replies have been filed.

This case involves the plaintiff's claim to a refund of penalties assessed against him by the internal revenue Service, pursuant to 26 U.S.C.A. § 6701 (West 1989), for aiding and abetting in the understatement of tax liability of another taxpayer. Section 6701 provides, in relevant part:

> **§ 6701 Penalties for aiding and abetting understatement of tax liability**
>
> **(a) Imposition of penalty.** – Any person –
>
> (1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of any portion or a return, affidavit, claim or other document,
>
> (2) who knows (or has reason to believe) that such portion will be used in connection

with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each document in the amount determined under subsection (b).

(b) Amount of penalty. –

(1) **In general.** – Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) **Corporations.** – If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) **Only 1 penalty per person per period.** – If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

. . . .

Plaintiff was penalized in relation to quarterly tax returns (Form 941) for Vanco International, Inc., and wage and tax statements (W-2 Forms) for Vanco employees, which plaintiff prepared in 1982 and 1983. The last of the documents related to taxes for the year 1982 was filed on or before January 31, 1983. The last of

the documents related to taxes for the year 1983 was filed on or before January 31, 1984. Each document is alleged to contain false information concerning wages. The IRS notified the plaintiff by two separate Notices of Penalty Charge, one dated November 14, 1988, and the other dated November 21, 1988. Plaintiff was assessed penalties of $80,000 ($10,000 for each of eight quarterly Form 941's prepared) and $19,000 ($1,000 for each of nineteen W-2 Forms prepared). The defendant claims the full $99,000 of penalties assessed.

I. The Applicable Statute of Limitations

In the first of the plaintiff's arguments for partial summary judgment, he asserts that the five year limitations period set out in 28 U.S.C.A. § 2462 bars the assessment and collection of a portion of the Section 6701 penalties assessed. He argues that because the Code makes no specific provision for a statute of limitations applicable to Section 6701, 28 U.S.C.A. § 2462 applies by default.

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary, or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued. . . .

Id. The Critical question in resolving this issue is whether Congress intended *any* statute of limitations to apply.

When Congress enacted Section 6701, it also enacted a section containing rules applicable to Section 6701 (as well as 6700 and 6702) penalties. Section 6703 provides:

§ 6703. Rules applicable to penalties under sections 6700, 6701, and 6702

(a) Burden of proof. – In any proceeding involving the issue of whether or not any person is liable for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

(b) Deficiency procedures not to apply. – Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment of collection of the penalties provided by sections 6700, 6701, and 6702.

(c) Extension of period of collection where person pays 15 percent of penalty. –

. . . .

No limitations period is included in Section 6701 or its applicable rules. The plaintiff contends that unless Congress specifically provided an unlimited limitations period, some statute of limitations must apply. "A statute of limitations is an almost indispensable element of fairness as well as practical administration of an income tax policy." *Rothensies v. Electric Storage Battery Co.*, 329 U.S. 296, 301 (1946).

Plaintiff points to analogous sections of the Code where an unlimited period is specifically provided. Congress proscribed the understatement of a taxpayer's liability by an income tax return preparer in 26 U.S.C.A. § 6694. As in Section 6703, Section 6696 provides the rules applicable to Section 6694. In Addition to Subsections titled "**(a) Penalties to be additional to other penalties.** – . . . . **(b) Deficiency procedures not to apply.** –. . . . **(c)**

Procedure for claiming refund. –. . . . ," Section 6696 includes the following:

> **(d) Periods of Limitation.** –
>
> **(1) Assessment.** – The amount of any penalty under section 6694(a) . . . shall be assessed within 3 years after the return of claim for refund with respect to which the penalty is assessed was filed, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. **In the case of any penalty under section 6694(b) [willful understatement of liability], the penalty may be assessed, or a proceeding in court for the collection of the penalty may be begun without assessment, at any time.**

26 U.S.C.A. § 6696(d) (emphasis added). Similarly, when Congress wanted an unlimited statute of limitations to apply to the penalty for taxpayer fraud, it specifically provided one in Section 6501(c).

The defendant argues generally that if Congress has enacted no statute of limitations to run against the government, courts should not and do not impose one. It contends that "statutes of limitation sought to be applied to bar rights of the government must receive a strict construction in favor of the Government," quoting *Badaracco v. Commissioner of Internal Revenue*, 464 U.S. 386, 391 (1984). In *Badaracco*, the Court considered the applicability of Section 6501, which sets forth limitations periods on the assessment and collection of taxes, to deficiencies in corporate income tax returns. The plaintiff's position in this tax refund case was that the three year limitations period provided in Section 6501(a) barred

collection of taxes on fraudulently filed returns in 1967 and 1968. Section 6501 provides in pertinent part:

> **(a) General Rule.** – Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within three years after the return was filed. . . .

The plaintiff filed amended returns disclosing the deficiency in 1973, but a deficiency notice was not issued until 1979. Rejecting the plaintiff's arguments in support of its position, the Court found that the case was "squarely controlled by the clear language of § 6501(c)(1)." *Id.* at 392. Section 6501(c)(1) creates exceptions to the three year general rule for filing false returns and for other special circumstances. "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, **at any time.**" 26 U.S.C.A. § 6501(c)(1) (emphasis added).

Without further guidance from the United States Supreme Court, this Court is not bound in the instant case by the high court's decision in a *tax collection* case construing a statute setting forth the limitations on assessment and collection of taxes, which specifically provides for an unlimited collection period. Unlike the assessment in *Badaracco*, the payment at issue in the case at bar concerns penalty assessments, and the relevant statute does not specifically provide for a limitations period, be it three years, five years, or "at any time."

Neither party cites controlling authority which has addressed the question of whether 28 U.S.C.A. § 2462 applies to Section 6701 penalties. However, several U.S.

District Court cases have addressed the question of whether 26 U.S.C.A. § 6501(a) applies. In *Kuchen v. U.S.*, 679 F. Supp. 764 (N.D. Ill. 1988), the plaintiff, a C.P.A., was assessed penalties under Section 6701 for letters sent over a three year period to 191 investors in an abusive tax shelter. He argued that 26 U.S.C.A. § 6501 barred assessments in the first year, because that year fell outside of the three year period in Section 6501(a). Kuchen argued that the three year limit applied because Section 6671(a) states that penalties provided in Subchapter B of Chapter 68 of Title 26, which includes Section 6701, are to be assessed as taxes.

> **§ 6671. Rules for application of assessable penalties**
>
> **(a) Penalty assessed as tax.** – The penalties and liabilities provided by this subchapter shall be paid upon notice and demand by the Secretary, and shall be assessed and collected in the same manner as taxes. Except as otherwise provided, any reference in this title to "tax" imposed by this title shall be deemed also to refer to the penalties and liabilities provided by this subchapter.

The district court rejected Kuchen's argument on several grounds. First, the assessment of Section 6701 penalties is not dependent upon the filing of a tax return, which would seem to be the act triggering the application of Section 6501. More importantly, the court relied on *Badarracco* [sic], *supra*, to find that,

> Congress did not intend that § 6501(a) apply to the assessment of penalties under § 6701. Rather, § 6701 is analogous to other sections

> enacted to combat fraud which provide unlimited periods of limitation (e.g. 26 U.S.C. §§ 6653(b), 6694(b)).

Kuchen, 679 F. Supp. at 768. The court held that an unlimited period is applicable both because Congress provided no period and because such a result is consistent with the [sic] how Congress has limited, or failed to limit, the actionable period on other civil tax fraud provisions. *See also Emanuel v. U.S.*, 705 F. Supp. 434 (N.D. Ill. 1989); *Agbanc, Ltd. v. U.S.*, 707 F. Supp. 423, 426 (D. Ariz. 1988) ("To create a statute of limitations in this particular situation where one does not exist is not the province of this Court but rather that of the Congress."). These district courts did not address the applicability of 28 U.S.C.A. § 2462, although the rationale supporting their decisions suggests that faced with the question of whether the five year limitation period applies to Section 6701 penalties, they would answer "no."

Speculation as to future decisions of sister courts aside, this Court is of the opinion that it is not *clear* that no limitation period is to apply. The defendant's argument for applying analogous code provisions is somewhat persuasive; however, the case at bar is not the type of case to warrant the court's imposition of an unlimited period. Furthermore, the default statute of limitations set forth in 28 U.S.C.A. § 2462 cannot be ignored. Where Congress has failed to otherwise provide a limitations period, or has failed to specifically provide that an action may be brought at any time, Congress has expressed its intent in 28 U.S.C.A. § 2462. The plaintiff's motion for partial summary judgment on those penalties assessed on documents filed more than five years before November

14, 1988 or before November 21, 1988, where applicable respectively, will be sustained.

II. The "One Penalty Per Person Per Period" Limitation

Plaintiff presents an issue of first impression in his second claim for partial summary judgment. Section 6701(b) provides:

> (3) **Only 1 penalty per person per period.** – If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period or event.

Plaintiff asserts that under this section, he should have been fined for only one quarterly Form 941 filing in 1982 and one in 1983. At $10,000 per document, the total would be $20,000, instead of the $80,000 the I.R.S. actually assessed. He argues that because income taxes are annual taxes, the "taxable period" referred to in section 6701(b)(3) is one full tax year. The annual taxes do not become quarterly taxes merely because of the quarterly filing requirement.

The defendant argues that the plain language of the statute refutes the plaintiff's contention. A penalty assessed under Section 6701(a) is, as a general rule, a "per document" penalty. When Congress limited the penalty

to once per underlying taxpayer, it chose the words "taxable period," not "calendar year." Withholding tax and the employer's FICA is assessed on a quarterly basis; therefore, the pertinent taxable period in this case is the calendar quarter. The answer to the question presented will turn upon the definition of "taxable period" as it pertains to Form 941's.

Plaintiff relies in part on two cases which do not decide the issue before this court. In *Kuchen v. U.S.*, 679 F. Supp. 764 (N.D. Ill. 1988), the court rejected the plaintiff's argument that the penalty be imposed for the taxable period to which the underlying tax documents relate. The court held that "simple logic dictates that the penalty should relate to the year in which the prohibited conduct occurs rather than the year for which the underlying tax document was prepared." *Id.* at 767. The court's references to "the year" were dictated by the fact that the documents at issue were prepared only for annual taxable periods.

Plaintiff also cites *Spriggs v. U.S.*, 660 F. Supp. 789 (E.D. Va. 1987), *aff'd* 850 F.2d 690 (4th Cir. 1988), which was decided under 26 U.S.C. § 6700. The abusive tax shelter provision contains no limitation by "taxable period." Under Section 6700, the individual is penalized on an "activity" basis, for organizing or participating in the sale of an abusive tax shelter. The court commented in a footnote that Section 6700 penalties are assessed in the same manner as taxes, that is, on an annual basis. *Id.* at 791 n.2. This supported its decision not to impose penalties for each sale, but rather for the salesperson's overall activity in promoting tax shelters. This rationale is not necessarily applicable to Section 6701 penalties, which are

clearly assessed on the basis of document preparation and filing. Moreover, in *Hill v. U.S.*, 720 F. Supp. 95 (W.D. Mich. 1989), the court rejected the *Spriggs* position and upheld a "per transaction" penalty assessment.

In *Emanuel v. U.S.*, 705 F. Supp. 434 (N.D. Ill. 1989) the court refused to uphold Section 6701 penalties assessed on applications for tentative refund, used to carry back unused credits from an earlier tax return, when the tax return was subject to a Section 6701 penalty. The court found that the refund applications "related to" the earlier tax period, for which the plaintiff had already been assessed penalties. Thus, Section 6701(b)(3) barred additional penalties on that tax period. The court relied on a passage from the legislative history of P.L. 97-248, which must be considered in the case at bar, but is arguably inapplicable or at least ambiguous, as applied to the preparation and filing of quarterly tax returns.

> The penalty can, however, be imposed only once for any taxable period (or taxable event) with respect to the taxpayer's actions in assisting any one person. Thus, someone who assists two individuals in preparing false documents would be liable for a $2,000 penalty whereas the penalty would be only $1,000 if he had advised in the preparation of two false documents for the same taxpayer.

S. Rep. 494, 97th Cong., 2d Sess. 276, *reprinted in* 1982 U.S. Code Cong. & Admin. News 781, 1023.

The defendant observes that because quarterly filing is required in order to ensure collection of taxes by employers, there are now four opportunities for tax preparers to prepare and file false returns. Rather than being

concerned with the type of tax on which a document is prepared, Congress intended to assess a penalty for any tax return or tax document for any tax period. It argues that the plaintiff's theory is directly contrary to the clear language of the statute. The limitations provision would also appear to contravene the strong policy relied upon by the defendant.

The plaintiff makes a proportionality argument that under the I.R.S. interpretation of Section 6701, the fines are potentially much stiffer than the penalties levied for similar conduct under other similar sections of the Code. For example, pursuant to Section 6694, when an income tax preparer negligently or intentionally understates a taxpayer's liability, the preparer is fined $100, and if the return preparer willfully understates that taxpayer's liability, the fine is $500. In other words, the $10,000 is twenty times larger than the maximum penalty that would be assessed against the return preparer under Section 6694. The Court notes that by recent amendments, Section 6694 penalties have been raised to $250 per return for a document reflecting an "unrealistic position", and to $1000 per return for a willfully or recklessly prepared return or claim for refund. 26 U.S.C.A. § 6694 (West Supp. 1990). This change does not abrogate the plaintiff's argument. By the defendant's interpretation of the penalty limitation, the already substantial $10,000 penalty can be, and in this case has been, multiplied by four.

The plaintiff also calls attention to the Secretary of the Treasury's discretion to determine the time of filing of returns, pursuant to Section 6071. He has chosen a quarterly period, but could, and in fact in some cases does, impose a monthly filing requirement. This multiplies the

potential annual liability for understatement of income on tax returns to $120,000. The Court recognizes this to be an oppressive, and thus a disfavored, result. The plaintiff should be liable for only one $10,000 penalty in the remaining year for which assessments are not time-barred.

The parties have agreed that there are no disputes of material fact with regard to the plaintiff's knowing preparation of the tax returns at issue containing understatements of tax liability. The plaintiff did assert that a question remained concerning his preparation of a W-2 form for employee "S" in 1983, claiming that the government failed to demonstrate an understatement of tax for that employee. The defendant has attached the second declaration of Revenue Agent Mark Silver, with exhibits, to its reply memorandum. It explains that its failure to detail the understatement on "S"'s W-2 form in the first filed exhibits was due to aggregating the understatement on "S"'s W-2 with the understatement on employee "M-2"'s W-2, to whom "S" is married, and with whom "S" filed a joint tax return. The Court is satisfied that this explanation disposes of the question with regard to the 1983 W-2 form prepared for employee "S", but out of an abundance of caution, the Court will allow the plaintiff sufficient time to supplement his reply memorandum to show why he should not be assessed a $1,000 penalty on the document at issue. The Court being sufficiently advised,

Accordingly,

IT IS THEREFORE ORDERED:

1) that the motion of the plaintiff, James M. Mullikin, Jr., for partial summary judgment be, and hereby is SUSTAINED;

2) that the cross-motion of the defendant, the United States of America, for summary judgment be, and hereby is, OVERRULED, subject to the following condition;

3) that the plaintiff shall have to and including August 1, 1990 to show cause why the defendant's motion for summary judgment on the penalty assessed for the preparation of the 1983 W-2 form for employee "S" should not be granted;

4) that the parties shall submit, by August 1, 1990, a joint stipulation of the total amount of penalties assessed for which the plaintiff is liable, minus payments for which the plaintiff has been credited. The stipulation should designate in the alternative, (1) the total amount, including the penalty on the W-2 prepared for employee "S", minus credits, and (2) the total amount, excluding the penalty on the W-2 prepared for employee "S", minus credits.

This the 12 day of July, 1990.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.
JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

CIVIL ACTION NO. 89-257

JAMES M. MULLIKIN, JR., PLAINTIFF,

VS.

UNITED STATES OF AMERICA, DEFENDANT.

JUDGMENT

(Filed Sep. 12, 1990)

This matter came before the Court upon the motion of the plaintiff, James M. Mullikin, Jr., for partial summary judgment, the motion of the defendant, the United States of America, for summary judgment, and the joint stipulation of the parties. For the reasons stated in a Memorandum Opinion and Order of July 13, 1990, and an Order of even date with this Judgment, this Court granted the plaintiff's motion for partial summary judgment, overruled the defendant's motion for summary judgment, and adopted the joint stipulation of the parties as to penalties assessed for which the plaintiff is liable. The Court being sufficiently advised;

Accordingly,

IT IS THEREFORE ORDERED AND ADJUDGED:

(1) that the motion of the plaintiff, James M. Mullikin, Jr., for partial summary judgement be, and hereby is SUSTAINED;

(2) that the motion of the defendant, the United States of America, for summary judgment be, and hereby is OVERRULED;

(3) that the defendant shall be barred from collecting on penalties assessed against the plaintiff on documents filed outside of the statutory period designated in 28 U.S.C. § 2462, and on penalties assessed on corporate tax returns in excess of $10,000 for the taxable period of 1983;

(4) that the balance due and owing by the plaintiff, James M. Mullikin, Jr., for the penalties assessed equals $5,150.00, plus interest running from the date of assessment.

This is a final and appealable order.

This 12 day of September, 1990.

/s/ Henry R. Wilhoit, Jr.
HENRY R. WILHOIT, JR.,
JUDGE

NOTICE IS HEREBY GIVEN
OF THE ENTRY OF THIS
ORDER OR JUDGMENT
ON 9-12-90
LESLIE G. WHITMER,
CLERK
BY: /s/ Sharon Vrolyk D.C.

Internal Revenue Code (26 U.S.C.):

SECTION 6700. PROMOTING ABUSIVE TAX SHELTERS, ETC.

(a) IMPOSITION OF PENALTY. – Any person who –

(1) (A) organizes (or assists in the organization of) –

(i) a partnership or other entity,

(ii) any investment plan or arrangement, or

(iii) any other plan or arrangement, or

(B) participates (directly or indirectly) in the sale of any interest in an entity or plan or arrangement referred to in subparagraph (A), and

(2) makes or furnishes or causes another person to make or furnish (in connection with such organization or sale) –

(A) a statement with respect to the allowability of any deduction or credit, the excludability of any income, or the securing of any other tax benefit by reason of holding an interest in the entity or participating in the plan or arrangement which the person knows or has reason to know is false or fraudulent as to any material matter, or

(B) a gross valuation overstatement as to any material matter,

shall pay, with respect to each activity described in paragraph (1), a penalty equal to the $1,000 or, if the person

establishes that it is lesser, 100 percent of the gross income derived (or to be derived) by such person from such activity. For purposes of the preceding sentence, activities described in paragraph (1)(A) with respect to each entity or arrangement shall be treated as a separate activity and participation in each sale described in paragraph (1)(B) shall be so treated.

(b) RULES RELATING TO PENALTY FOR GROSS VALUATION OVERSTATEMENTS. –

(1) GROSS VALUATION OVERSTATEMENTS DEFINED. – For purposes of this section, the term "gross valuation overstatement" means any statement as to the value of any property or services if –

(A) the value so stated exceeds 200 percent of the amount determined to be the correct valuation, and

(B) the value of such property or services is directly related to the amount of any deduction or credit allowable under chapter 1 to any participant.

(2) AUTHORITY TO WAIVE. – The Secretary may waive all or any part of the penalty provided by subsection (a) with respect to any gross valuation overstatement on a showing that there was a reasonable basis for the valuation and that such valuation was made in good faith.

Internal Revenue Code (26 U.S.C.):

SECTION 6701. PENALTIES FOR AIDING AND ABETTING UNDERSTATEMENT OF TAX LIABILITY.

(a) IMPOSITION OF PENALTY. – Any person –

(1) who aids or assists in, procures, or advises with respect to, the preparation or presentation of

any portion of a return, affidavit, claim, or other document,

(2) who knows (or has reason to believe) that such portion will be used in connection with any material matter arising under the internal revenue laws, and

(3) who knows that such portion (if so used) would result in an understatement of the liability for tax of another person,

shall pay a penalty with respect to each such document in the amount determined under subsection (b).

(b) AMOUNT OF PENALTY. –

(1) IN GENERAL. – Except as provided in paragraph (2), the amount of the penalty imposed by subsection (a) shall be $1,000.

(2) CORPORATIONS. – If the return, affidavit, claim, or other document relates to the tax liability of a corporation, the amount of the penalty imposed by subsection (a) shall be $10,000.

(3) ONLY 1 PENALTY PER PERSON PER PERIOD. – If any person is subject to a penalty under subsection (a) with respect to any document relating to any taxpayer for any taxable period (or where there is no taxable period, any taxable event), such person shall not be subject to a penalty under subsection (a) with respect to any other document relating to such taxpayer for such taxable period (or event).

(c) ACTIVITIES OF SUBORDINATES. –

(1) IN GENERAL. – For purposes of subsection (a), the term "procures" includes –

(A) ordering (or otherwise causing) a subordinate to do an act, and

(B) knowing of, and not attempting to prevent, participation by a subordinate in an act.

(2) SUBORDINATE. – For purposes of paragraph (1), the term "subordinate" means any other person (whether or not a director, officer, employee, or agent of the taxpayer involved) over whose activities the person has direction, supervision, or control.

(d) TAXPAYER NOT REQUIRED TO HAVE KNOWLEDGE. – Subsection (a) shall apply whether or not the understatement is with the knowledge or consent of the persons authorized or required to present the return, affidavit, claim or other document.

(e) CERTAIN ACTIONS NOT TREATED AS AID OR ASSISTANCE. – For purposes of section (a)(1), a person furnishing typing, reproducing, or other mechanical assistance with respect to a document shall not be treated as having aided or assisted in the preparation of such document by reason of such assistance.

(f) PENALTY IN ADDITION TO OTHER PENALTIES. –

(1) IN GENERAL. – Except as provided by paragraphs (2) and (3), the penalty imposed by this section shall be in addition to any other penalty provided by law.

(2) COORDINATION WITH RETURN PREPARER PENALTIES. – No penalty shall be assessed under subsection (a) or (b) of section 6694 on any person with respect to any document for which a penalty is assessed on such person under subsection (a).

(3) COORDINATION WITH SECTION 6700. – No penalty shall be assessed under section 6700 on

any person with respect to any document for which a penalty is assessed on such person under subsection (a).

Internal Revenue Code (26 U.S.C.):

SECTION 6702. FRIVOLOUS INCOME TAX RETURN.

(a) CIVIL PENALTY. – If –

(1) any individual files what purports to be a return of the tax imposed by subtitle A but which –

(A) does not contain information on which the substantial correctness of the self-assessment may be judged, or

(B) contains information that on its face indicates that the self-assessment is substantially incorrect; and

(2) the conduct referred to in paragraph (1) is due to –

(A) a position which is frivolous, or

(B) a desire (which appears on the purported return) to delay or impede the administration of Federal income tax laws,

then such individual shall pay a penalty of $500.

(b) PENALTY IN ADDITION TO OTHER PENALTIES. – The penalty imposed by subsection (a) shall be in addition to any other penalty provided by law.

Internal Revenue Code (26 U.S.C.):

SECTION 6703. RULES APPLICABLE TO PENALTIES UNDER SECTIONS 6700, 6701, AND 6702.

(a) BURDEN OF PROOF. – In any proceeding involving the issue of whether or not any person is liable

for a penalty under section 6700, 6701, or 6702, the burden of proof with respect to such issue shall be on the Secretary.

(b) DEFICIENCY PROCEDURES NOT TO APPLY. – Subchapter B of chapter 63 (relating to deficiency procedures) shall not apply with respect to the assessment or collection of the penalties provided by sections 6700, 6701, and 6702.

(c) EXTENSION OF PERIOD OF COLLECTION WHERE PERSON PAYS 15 PERCENT OF PENALTY. –

(1) IN GENERAL. – If, within 30 days after the day on which notice and demand of any penalty under section 6700 or 6701 is made against any person, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of section 7421(a), the beginning or such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) PERSON MUST BRING SUIT IN DISTRICT COURT TO DETERMINE HIS LIABILITY FOR PENALTY. – If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under section 6700 or 6701 is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund),

the person fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) SUSPENSION OF RUNNING OF PERIOD OF LIMITATIONS ON COLLECTION. – The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

28 U.S.C. § 2462:

Time for commencing proceedings. Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 791:

Penalties and forfeitures; under laws of United States. No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued: Provided, That the person of the offender, or the property liable

for such penalty or forfeiture, shall, within the same period, be found within the United States; so that the proper process therefore may be instituted and served against such person or property. (R.S. § 1047.)

Internal Revenue Code (26 U.S.C.):

SECTION 6501. LIMITATIONS ON ASSESSMENT AND COLLECTION.

(a) GENERAL RULE. – Except as otherwise provided in this section, the amount of any tax imposed by this title shall be assessed within 3 years after the return was filed (whether or not such return we filed on or after the date prescribed) or, if the tax is payable by stamp, at any time after such tax became due and before the expiration of 3 years after the date on which any part of such tax was paid, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(b) TIME RETURN DEEMED FILED.

(1) EARLY RETURN. – For purposes of this section, a return of tax imposed by this title, except tax imposed by chapter 3, 21, or 24, filed before the last day prescribed by law or by regulations promulgated pursuant to law for the filing thereof, shall be considered as filed on such last day.

(2) RETURN OF CERTAIN EMPLOYMENT TAXES AND TAX IMPOSED BY CHAPTER 3. – For purposes of this section, if a return of tax imposed by chapter 3, 21 or 24 for any period ending with or within a calendar year is filed before April 15 of the succeeding calendar year, such return shall be considered filed on April 15 of such calendar year.

(3) RETURN EXECUTED BY SECRETARY. – Notwithstanding the provisions of paragraph (2) of section 6020(b), the execution of a return by the Secretary pursuant to the authority conferred by such section shall not start the running of the period of limitations on assessment and collection.

(4) RETURN OF EXCISE TAX. – For purposes of this section, the filing of a return for a specified period on which an entry has been made with respect to a tax imposed under a provision of subtitle D (including a return on which an entry has been made showing no liability for such tax for such period) shall constitute the filing of a return of all amounts of such tax which, if properly paid, would be required to be reported on such return for such period.

(c) EXCEPTIONS. –

(1) FALSE RETURN. – In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time.

(2) WILLFUL ATTEMPT TO EVADE TAX. – In case of a willful attempt in any manner to defeat or evade tax imposed by this title (other than tax imposed by subtitle A or B), the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(3) NO RETURN. – In the case of failure to file a return, the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(4) EXTENSION BY AGREEMENT. – Where, before the expiration of the time prescribed in this section for the assessment of any tax imposed by this title, except the estate tax provided in chapter 11,

both the Secretary and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(5) TAX RESULTING FROM CHANGES IN CERTAIN INCOME TAX OR ESTATE TAX CREDITS. –

For special rules applicable in cases where the adjustment of certain taxes allowed as a credit against income taxes or estate taxes results in additional tax, see section 905(c) (relating to the foreign tax credit for income tax purposes) and section 2016 (relating to taxes of foreign countries, States, etc., claimed as credit against estate taxes).

(6) TERMINATION OF PRIVATE FOUNDATION STATUS. – In the case of a tax on termination of private foundation status under section 507, such tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

(7) SPECIAL RULE FOR CERTAIN AMENDED RETURNS. – Where, within the 60-day period ending on the day on which the time prescribed in this section for the assessment of any tax imposed by subtitle A for any taxable year would otherwise expire, the Secretary receives a written document signed by the taxpayer showing that the taxpayer owes an additional amount of such tax for such taxable year, the period for the assessment of such additional amount shall not expire before the 60 days after the day on which the Secretary receives such document.

(8) FAILURE TO NOTIFY SECRETARY UNDER SECTION 6038B. – In the case of any tax imposed on any exchange or distribution by reason of subsection (a), (d), or (e) of section 367, the time for assessment of such tax shall not expire before the date which is 3 years after the date on which the Secretary is notified of such exchange or distribution under section 6038B(a).

(9) GIFT TAX ON CERTAIN GIFTS NOT SHOWN ON RETURN. – If any gift of property the value of which is determined under section 2701 or 2702 (or any increase in taxable gifts required under section 2701(d)) is required to be shown on a return of tax imposed by chapter 12 (without regard to section 2503(b)), and is not shown on such return, any tax imposed by chapter 12 on such gift may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time. The preceding sentence shall not apply to any item not shown as a gift on such return if such item is disclosed in such return, or in a statement attached to the return, in a manner adequate to apprise the Secretary of the nature of such item.

Internal Revenue Code (26 U.S.C.):

SECTION 6502. COLLECTION AFTER ASSESSMENT.

(a) LENGTH OF PERIOD. – Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun –

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. If a timely proceeding in court for the collection of a tax is commenced, the period during which such tax may be collected by levy shall be extended and shall not expire until the liability for the tax (or a judgment against the taxpayer arising from such liability) is satisfied or becomes enforceable.

Internal Revenue Code (26 U.S.C.):

SECTION 6694. UNDERSTATEMENT OF TAXPAYER'S LIABILITY BY INCOME TAX RETURN PREPARER.

(a) UNDERSTATEMENTS DUE TO UNREALISTIC POSITIONS. – If –

(1) any part of any understatement of liability with respect to any return or claim for refund is due to a position for which there was not a realistic possibility of being sustained on its merits,

(2) any person who is an income tax return preparer with respect to such return or claim knew (or reasonably should have known) of such position, and

(3) such position was not disclosed as provided in section 6662(d)(2)(B)(ii) or was frivolous,

such person shall pay a penalty of $250 with respect to such return or claim unless it is shown that there is reasonable cause for the understatement and such person acted in good faith.

(b) WILLFUL OR RECKLESS CONDUCT. – If any part of any understatement of liability will respect to any return or claim for refund is due –

(1) to a willful attempt in any manner to understate the liability for tax by a person who is an income tax return preparer with respect to such return or claim, or

(2) to any reckless or intentional disregard of rules or regulations by any such person,

such person shall pay a penalty of $1,000 with respect to such return or claim. With respect to any return or claim, the amount of the penalty payable by any person by reason of this subsection shall be reduced by the amount of the penalty paid by such person by reason of subsection (a).

(c) EXTENSION OF PERIOD OF COLLECTION WHERE PREPARER PAYS 15 PERCENT OF PENALTY. –

(1) IN GENERAL. – If, within 30 days after the day on which notice and demand of any penalty under subsection (a) or (b) is made against any person who is an income tax return preparer, such person pays an amount which is not less than 15 percent of the amount of such penalty and files a claim for refund of the amount so paid, no levy or proceeding in court for the collection of the remainder of such penalty shall be made, begun, or prosecuted until the final resolution of a proceeding begun as provided in paragraph (2). Notwithstanding the provisions of

section 7421(a), the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court. Nothing in this paragraph shall be construed to prohibit any counterclaim for the remainder of such penalty in a proceeding begun as provided in paragraph (2).

(2) PREPARER MUST BRING SUIT IN DISTRICT COURT TO DETERMINE HIS LIABILITY FOR PENALTY. – If, within 30 days after the day on which his claim for refund of any partial payment of any penalty under subsection (a) or (b) is denied (or, if earlier, within 30 days after the expiration of 6 months after the day on which he filed the claim for refund), the income tax return preparer fails to begin a proceeding in the appropriate United States district court for the determination of his liability for such penalty, paragraph (1) shall cease to apply with respect to such penalty, effective on the day following the close of the applicable 30-day period referred to in this paragraph.

(3) SUSPENSION OF RUNNING OF PERIOD OF LIMITATIONS ON COLLECTION. – The running of the period of limitations provided in section 6502 on the collection by levy or by a proceeding in court in respect of any penalty described in paragraph (1) shall be suspended for the period during which the Secretary is prohibited from collecting by levy or a proceeding in court.

Internal Revenue Code (26 U.S.C.):

SECTION 6696. RULES APPLICABLE WITH RESPECT TO SECTION 6694 AND 6695.

(d) PERIODS OF LIMITATION. –

(1) ASSESSMENT. – The amount of any penalty under section 6694(a) or under section 6695 shall be assessed within 3 years after the return or claim for refund with respect to which the penalty is assessed was filed, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period. In the case of any penalty under section 6694(b), the penalty may be assessed, or a proceeding in court for the collection of the penalty may be begun without assessment, at any time.

(2) CLAIM FOR REFUND. – Except as provided in section 6694(d), any claim for refund of an overpayment of any penalty assessed under section 6694 or 6695 shall be filed within 3 years from the time the penalty was paid.

(2)

No. 91-2000

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

JAMES M. MULLIKIN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the five-year statute of limitations in 28 U.S.C. 2462 applies to the administrative assessment of penalties under Section 6701 of the Internal Revenue Code, 26 U.S.C. 6701, for aiding and abetting the understatement of tax liability.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-35) is reported at 952 F.2d 920. The opinion of the district court (Pet. App. 37-50) is unreported.

JURISDICTION

The judgment of the court of appeals was filed on December 30, 1991. An order denying the petition for rehearing was entered on March 13, 1992 (Pet. App. 36). The petition for a writ of certiorari was filed on June 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During 1982 and 1983, petitioner prepared federal tax return forms and W-2 (Wage and Tax Statement) forms for Vanco International, Inc. (Vanco). In preparing these forms, petitioner omitted substantial amounts of cash compensation paid to Vanco employees, thereby understating Vanco's employment tax liability and its employees' income tax liabilities. The Internal Revenue Service (IRS) determined that petitioner's actions constituted aiding and abetting the understatement of tax liability within the meaning of Section 6701 of the Internal Revenue Code, 26 U.S.C. 6701. Accordingly, the IRS notified petitioner in November 1988 that it had made assessments against him under Section 6701 for the preparation of each of those forms. The aggregate amount of the penalties was $99,000. Pet. App. 4-5.

Under Section 6703(c) of the Code, a person against whom a penalty is assessed under Section 6701 may, within 30 days of notice of the assessment, pay 15% of the amount of the penalty and file a claim for refund. 26 U.S.C. 6703(c). If the refund claim is denied, or if the IRS does not act upon the claim within six months after it is filed, the person assessed may bring suit in district court for a refund of the amount paid. *Ibid.* Petitioner paid the requisite percentage of the penalties and filed administrative refund claims. The IRS denied some of the claims for refund and failed to act on the others within six months. Pet. App. 6; C.A. App. 16. Petitioner then brought this action in district court seeking a refund of the partial payments and an injunction against collection of the unpaid balance of the penalties.

2. The district court held that the five-year statute of limitations of 28 U.S.C. 2462 is applicable to penal-

ties assessed under Section 6701 and bars much of the assessment in this case (Pet. App. 39-45). 28 U.S.C. 2462 provides that

> [e]xcept as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued * * *.

Because Congress did not expressly provide a limitations period for the assessment of penalties under Section 6701, the court held that the limitations period provided in 28 U.S.C. 2462 applies to such assessments (Pet. App. 44-45). The court also concluded that the five-year limitations period of 28 U.S.C. 2462 runs from the date of the act giving rise to the imposition of the penalty (Pet. App. 44-45). The court therefore held that the penalties assessed by the IRS for false returns filed more than five years prior to the date of the assessment are barred by the statute of limitations (ibid.).[1]

3. The court of appeals reversed, for "Congress did not intend that the statute of limitations contained in Section 2462 apply to the assessment of penalties

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[1] This holding did not dispose of all the penalties at issue in this case, since some of the false returns were filed less than five years prior to the date of the penalty assessments. With respect to such penalties, the district court concluded that petitioner's liability under Section 6701(b)(3) of the Code for the four false forms prepared for Vanco's 1983 employment taxes was limited to one $10,000 penalty per calendar year, rather than one $10,000 penalty per calendar quarter, as the government had maintained. The court of appeals reversed that holding (Pet. App. 25-33), and petitioner has not sought further review of that issue in this Court.

pursuant to Section 6701" (Pet. App. 19-20). The court noted that, because claims asserted by the government are not subject to a statute of limitations unless Congress has expressly so provided, statutes of limitations sought to be applied against the government are to be strictly construed in the government's favor (Pet. App. 23). While the Internal Revenue Code does not specify a period of limitations on assessment of penalties under Section 6701, Section 6502 of the Code does provide a six-year (now ten-year) statute of limitations for an action to collect the assessment once it has been made (Pet. App. 23-24). "Application of [28 U.S.C.] 2462 to Section 6701 penalties is therefore contrary to the intent of Congress" (Pet. App. 23).

Judge Boggs dissented. He concluded that 28 U.S.C. 2462 is a "catchall statute," and, since there is no express limitations period for penalty assessments under Section 6701, the five-year limitations period of 28 U.S.C. 2462 must apply (Pet. App. 34).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly held that the statute of limitations contained in 28 U.S.C. 2462 has no application to this case. By its plain language, that statute imposes no limitation on the period in which the IRS may make an administrative assessment of penalties under Section 6701 of the Internal Revenue Code. When Congress has not otherwise provided any different limitations period, 28 U.S.C. 2462 imposes a five-year period of limitations within which the United States may institute an "*action, suit or*

proceeding for the enforcement of any civil fine, penalty or forfeiture" (*ibid.* (emphasis added)). The assessment of penalties (or taxes) by the IRS is a purely administrative act that does not involve or require any judicial proceeding or action. See 26 U.S.C. 6201, 6203. An assessment is made when the appropriate administrative officer signs the summary record of assessment. See 26 C.F.R. 301.6203-1. Because the assessment of penalties or taxes by the IRS is an administrative act, the five-year limitations period provided in 28 U.S.C. 2462 on the institution by the United States of "action[s], suit[s] or proceeding[s] for the enforcement of * * * civil fine[s or] penalt[ies]" has no application to this case.[2]

We agree, of course, that 28 U.S.C. 2462 would impose a five-year period of limitations on the commencement of judicial proceedings to enforce an assessed Section 6701 penalty if Congress had not provided a *different* period of limitations for the enforcement proceedings. Cf. *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985). But, in Section 6502 of the Internal Revenue Code, Congress *has* provided a different period of limitations for enforcement of Section 6701 penalty assessments. Section 6502 expressly provides a ten-year (formerly a six-year) period of limitations for the collection of such penalty assessments "by a proceeding in court" (26 U.S.C. 6502). Since Congress has provided a separate limitations period in Section 6502 of the Code for the institution of suits to enforce as-

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[2] As a general rule, 26 U.S.C. 6501(a) requires that any tax reported on a return must be assessed within three years of the date the taxpayer's return is filed. Petitioner does not dispute, however, that Section 6501 has no application to penalties imposed under Section 6701 (see *Sage* v. *United States*, 908 F.2d 18, 25 (5th Cir. 1990)).

sessed penalties or taxes, the express terms of 28 U.S.C. 2462 make that statute inapplicable to such enforcement actions.[3]

2. Petitioner errs in asserting (Pet. 14-15) that the decision in this case conflicts with the principles of *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800 (1976). In that case, the Court stated that, where Congress employs the phrase "except as otherwise provided" in a statute conferring jurisdiction on the federal courts, any exception to the statute must be "clear" and "affirmative" and may not be implied. *Id.* at 808. Petitioner argues that the court of appeals erroneously refused to apply 28 U.S.C. 2462 in this case because there is no "clear" and "affirmative" exception to that statute in the Internal Revenue Code. That argument, as well as petitioner's reliance on *Colorado River Water Conservation District*, is misconceived. As the court of appeals explained (Pet. App. 23):

> Section 2462, by its express terms, applies only in instances in which Congress has not otherwise provided for a statute of limitations; in the case of Section 6701 penalties, * * * Congress has otherwise provided for a statute of limitations within the Internal Revenue Code and therefore, Section 2462 has no application.

While Congress provided no statute of limitations on the administrative *assessment* of penalties under Section 6701, it did impose in Section 6502 of the Internal Revenue Code a period of limitations (previously six years but now ten years) on the com-

[3] To the extent the filing of the government's counterclaim in this case may constitute the commencement of a collection suit, it was timely under Section 6502 and petitioner does not contend otherwise.

mencement of "proceedings in court" for the collection of penalties assessed under Section 6701. See 26 U.S.C. 6502. As the court correctly concluded, 28 U.S.C. 2462 has no application to Section 6701 penalties because Congress *has* expressly provided a separate limitations period in the Internal Revenue Code for the commencement of judicial proceedings to collect assessed taxes and penalties. The decision in this case is thus entirely consistent with this Court's decision in *Colorado River Water Conservation District* v. *United States*.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1992

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[4] For the same reason, the decision in this case does not conflict with *United States* v. *Core Laboratories, Inc.*, 759 F.2d 480 (5th Cir. 1985), on which petitioner erroneously relies (Pet. 18, 23). The timeliness of the assessment of a penalty under the Internal Revenue Code was not an issue in *Core Laboratories*. That case concerned the timeliness of judicial proceedings brought by the government to enforce civil penalties for export trade violations. See 759 F.2d at 481. It was conceded by all parties in *Core Laboratories* that 28 U.S.C. 2462 applied to the judicial proceedings involved in that case. See 759 F.2d at 481.

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v.

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

The Government in its brief in opposition makes two arguments why the court of appeals' opinion in *Mullikin v. United States*, 952 F.2d 920 (6th Cir. 1991) is correct and not in conflict with the decisions of this Court or any other circuit. First, the Government argues 28 U.S.C. §2462 does not apply to administrative acts to enforce penalties, but instead prohibits only untimely judicial actions. Second, it argues that the court of appeals' opinion is not in conflict with *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), because Congress made the necessary "clear" and "affirmative"

showing of its intent to override the application of 28 U.S.C. §2462 to tax shelter penalties[1] by enacting 26 U.S.C. §6502 (the statute of limitations on the collection of timely assessed penalties by judicial actions). *Strangely, the Government does not claim, as did the court, that 26 U.S.C. §6701, itself, contained the clear and affirmative expression of Congressional intent necessary to override 28 U.S.C. §2462.*

In fact, although the Government made both of these arguments before the court of appeals below, neither of the arguments appears to be part of the rationale relied on by the court.[2] This is particularly troubling because the Government appears to be either obfuscating the court's rationale or resurrecting arguments not relied on by the court of appeals to bolster an opinion that is clearly erroneous. In any event, for the reasons set forth

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[1] The impact of the Government's argument is that 26 U.S.C. §6502 preempts the application of 28 U.S.C. §2462 not only to tax shelter penalties but to all penalties under the Internal Revenue Code.

[2] Clearly, the court of appeals stated that it found it unnecessary to address the Government's argument that 28 U.S.C. §2462 does not bar the assessment of tax shelter penalties because the act of assessment is purely an administrative act and thus, not within the compass of 28 U.S.C. §2462. *See, Mullikin v. United States, supra,* at 929-930, footnote 17. Likewise, although the circuit court's opinion mentions 26 U.S.C. §6502 in its analysis of 26 U.S.C. §6703(c), it does not appear to either address or adopt the Government's contention that 26 U.S.C. §6502, in effect, preempts the application of 28 U.S.C. §2462 to both the administrative and judicial enforcement of tax shelter penalties. *Id.* at 929.

below, both of these arguments are patently wrong and should be rejected as a basis to deny Mullikin's petition.

There is abundant authority from this Court (*Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346 (1927)) and three circuits (1st, 2nd, and 5th) that 28 U.S.C. §2462 applies to administrative acts to enforce penalties as well as judicial actions. 28 U.S.C. §2462 is a broad statute that applies to both administrative and judicial "proceedings.".[3] The administrative actions, including the assessment of the penalties, taken by the Government in this case to enforce the tax shelter penalties are clearly covered by the statute. Furthermore, because 28 U.S.C. §2462 applies to both administrative and judicial acts and 26 U.S.C. §6502 does not, 26 U.S.C. §6502 cannot constitute the "clear" and "affirmative" Congressional Act required by *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976) to override the application of 28 U.S.C. §2462 to the administrative enforcement of penalties.

1. Proceedings.

28 U.S.C. §2462 applies, in part, to a "proceeding" to enforce penalties. The word "proceeding" has been viewed broadly by the courts. For example, in *Rice v.*

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[3] It is not surprising that 28 U.S.C. §2462 is written broadly with the intention of having broad application. Because it potentially applies to all penalties levied under the United States Code, the statute must be written broadly to cover the myriad of administrative and judicial procedures promulgated in the United States Code and Governmental regulations to enforce penalties.

United States, 356 F.2d 709 (8th Cir. 1966), the court considered the word "proceeding" as used in 18 U.S.C. §1505 (obstruction of justice statutes) and noted that in interpreting a statute, the words of the statute should be given their common usage, unless to do so would produce an absurd result. With that in mind, the court stated the common usage of the word "proceeding" was as follows:

> "Proceeding" is a comprehensive term meaning the actions of proceeding – *a particular step or series of steps,* adopted for accomplishing something. This is a dictionary definition as well as the meaning of the term in common parlance. Proceedings before a governmental department or agency simply mean proceeding in the manner and form prescribed for conducting business before the department or agency, including all *steps and stages in such an action from its inception to its conclusion. Id.* at 712. (Emphasis added.)

This Court in *Bowers v. New York & Albany Lighterage Co., supra,* has also concluded that the word "proceeding" has a broad meaning in the context of a statute of limitations applicable to tax collection efforts by the Government. In *Bowers, supra,* the Court held that the word "proceeding" as used in §250(d) of the Legislative Act of 1921, 42 Stat. 263, included *administrative* efforts by the Government to collect taxes by levy (distraint).

In so holding, the Court noted the purpose of the statute of limitations on the collection of taxes "was to fix a time *beyond which steps* to enforce collection might not be initiated." *Id.* at 349. (Emphasis added.) The Court also stated that, "[a] reasonable view of the matter is that it was the intention of Congress by the clause here in question to protect taxpayers against *any proceeding whatsoever*

for the collection of tax claims not made or pressed within five years." *Id.* at 351 (Emphasis added.)

Moreover, all courts that have addressed this question have concluded that 28 U.S.C. §2462 applies to *administrative* acts as well as judicial acts to enforce penalties. In *United States v. Meyer,* 808 F.2d 912 (1st Cir. 1987), the court observed that both the Government and the defendant agreed that under 28 U.S.C. §2462, "*administrative* action aimed at imposing a civil penalty must be brought within five years of the alleged violation." *Id.* at 914. (Emphasis added.) The court, in concurring with that agreement, relied on *Lancashire Shipping Co. v. Durning,* 98 F.2d 751 (2d Cir. 1938), *cert. denied,* 305 U.S. 635 (1938), wherein "the court held that the time requirement of the statute[4] was satisfied when the *administrative* proceeding – though not the judicial proceeding – was brought within the prescribed limitation period." *United States v. Meyer, supra,* at 914. (Emphasis added.)

Additionally, the United States Court of Appeals for the Fifth Circuit in *United States v. Core Laboratories, Inc.,* 759 F.2d 480 (5th Cir. 1985) recognized that the provisions of 28 U.S.C. §2462 apply to *administrative* proceedings to enforce penalties. The court in *Core Laboratories, supra,* noted that the legislative history of the Export Administrative Act, 50 U.S.C. §2401, *et. seq.,* specifically states that

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[4] The statute involved was 28 U.S.C. §791, App. to Pet., *infra,* at 59, the forerunner to 28 U.S.C. §2462.

the statute of limitations of 28 U.S.C. §2462 applies both to *administrative* and judicial proceedings. *Id.* at 482-483.[5]

The weight of this authority leads to the conclusion that 28 U.S.C. §2462 does apply to administrative acts to enforce penalties. Furthermore, based on this authority, it appears by using the word "proceeding", Congress intended the statute of limitations contained in 28 U.S.C. §2462 to apply to any "step" or "stage" in the penalty enforcement process. *Rice v. United States, supra,* at 712.

In this case, just as in *Bowers, supra,* it would appear to be a reasonable view that Congress intended to protect the individuals in question *"against any proceeding whatsoever"* for the enforcement of tax penalties not made or pressed within five years. *Bowers, supra,* at 351. (Emphasis added.) The application of these principles to the current case makes clear that the *administrative* assessment of the tax shelter penalties are within the purview of 28 U.S.C. §2462.

All of the steps in the enforcement process for tax shelter penalties, both administrative and judicial, are statutorily prescribed and subject to Treasury regulations, Internal Revenue Service rules and case law. They are substantial, interrelated and interdependent steps in a "proceeding" by the Government to enforce tax shelter

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[5] The Government in footnote 4 to its brief in opposition appears to represent that *Core Laboratories, supra,* involved only judicial actions to enforce penalties and has no relevance to the administrative enforcement of penalties under 28 U.S.C. §2462. Such an assertion is totally without merit. The court in *Core Laboratories, supra,* specifically and favorably addressed the application of 28 U.S.C. §2462 to administrative efforts to enforce penalties.

penalties. The assessment of the penalties is an integral part of the whole proceeding, just as the filing of a complaint is an integral portion of a law suit. In his dissent in *Mullikin, supra,* Judge Boggs recognized this and stated as follows:

> . . . the court's opinion states that there is no need to address the argument that §2462 could not apply as a bar to an action on a penalty assessment because such assessment was neither an "action" nor a "proceeding for the enforcement of any civil penalty". I would reject this argument because the assessment is a prerequisite to, and thus part of, the measures for the enforcement of a civil penalty. It would seem quite odd to say that the very act that initiates the actions leading to the collection of the penalty, a stream of events that must at some point be a proceeding, is not itself part of the proceedings. *Id.* at 933, dissenting footnote 1.

Accordingly, based on these authorities, Mullikin submits that the administrative assessment of the penalties is an integral step in a "proceeding" to enforce penalties, and is therefore within the purview of 28 U.S.C. §2462. This step was not taken within five years of the violation. The argument of the Government and any holding of the court of appeals in *Mullikin, supra,* to the contrary, are in conflict with the decisions of this Court and at least three other circuits. As such, they constitute another reason why the court of appeals' decision in this case warrants review.

2. Colorado River.

As shown by the discussion above, a proceeding to enforce a tax penalty is much broader than the filing of a law suit by the Government to collect the penalty once it has been finally determined to be owing. Pursuant to applicable statutes, regulations, and Internal Revenue Service rules, there are substantial administrative proceedings that must be timely conducted before the Government can judicially attempt to collect the penalty. For example, in the case of the enforcement of tax shelter penalties, an administrative assessment must first occur and the individual must be given a right to administratively contest the penalty before the Internal Revenue Service. This process involves administrative fact-finding, conferences, and negotiation.

All of this activity constitutes a proceeding to which 28 U.S.C. §2462 applies. Because 28 U.S.C. §2462 applies to both administrative and judicial acts to enforce penalties, including the administrative assessment of those penalties, it has broader application than 26 U.S.C. §6502, the provision of the Internal Revenue Code which limits the commencement of proceedings in court to collect the penalties once they have been timely assessed and the administrative and judicial contest over the penalties has been completed. In fact, 26 U.S.C. §6502 is specifically conditioned upon a timely assessment of a penalty being previously made.[6] Additionally, 26 U.S.C. §6703(c) makes

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[6] 26 U.S.C. §6502, in pertinent part, provides: (a) LENGTH OF PERIOD. – *Where the assessment of any tax imposed by this*

(Continued on following page)

clear that in the case of tax shelter penalties, 26 U.S.C. §6502 is further conditioned upon a final determination under that section that the penalties are due.

Because 26 U.S.C. §6502 does not apply to the administrative enforcement of the penalties, including timely assessment, it cannot be viewed as the "clear" and "affirmative" Act of Congress necessary to override the application of 28 U.S.C. §2462 to the administrative enforcement of the penalties as required by *Colorado River, supra.* Rather, under the tenets of that case, a subsequent statute will only be deemed to override a general statute, if the two statutes are irreconcilable. Here, they are not. While it is apparent that 26 U.S.C. §6502 is the clear Act of Congress necessary to override the application of 28 U.S.C. §2462 to the judicial collection of the penalties once they have been administratively and judicially determined to be owing, 26 U.S.C. §6502 specifically does not attempt to "abrogate" the application of 28 U.S.C. §2462 to administrative proceedings to enforce penalties. Accordingly, as set out in the petition, the court of appeals' decision in *Mullikin, supra,* to the contrary, is in direct conflict with this Court's decision in *Colorado River, supra,* and the Fifth Circuit's decision in *Core Laboratories, supra.*

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title has been made within the period of limitations properly applicable, such tax may be collected by levy or by a proceeding in Court, but only if the levy is made or the proceeding begun –

(1) within 6 years after the assessment of the tax . . .

(Emphasis added.)

Moreover, it cannot be forgotten that the court in *Mullikin, supra,* did not rely on this argument but instead explicitly stated it relied on the *silence* in 26 U.S.C. §§6701 & 6703 as to a statute of limitations to conclude that those statutes had overridden 28 U.S.C. §2462. The present argument raised by the Government appears to be designed to bolster the clearly erroneous rationale of the court in *Mullikin, supra.* Nevertheless, neither the court's rationale of silence, nor the Government's argument, that 26 U.S.C. §6502 constitutes the clear Act of Congress necessary to override 28 U.S.C. §2462, is valid.

CONCLUSION

For the foregoing reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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